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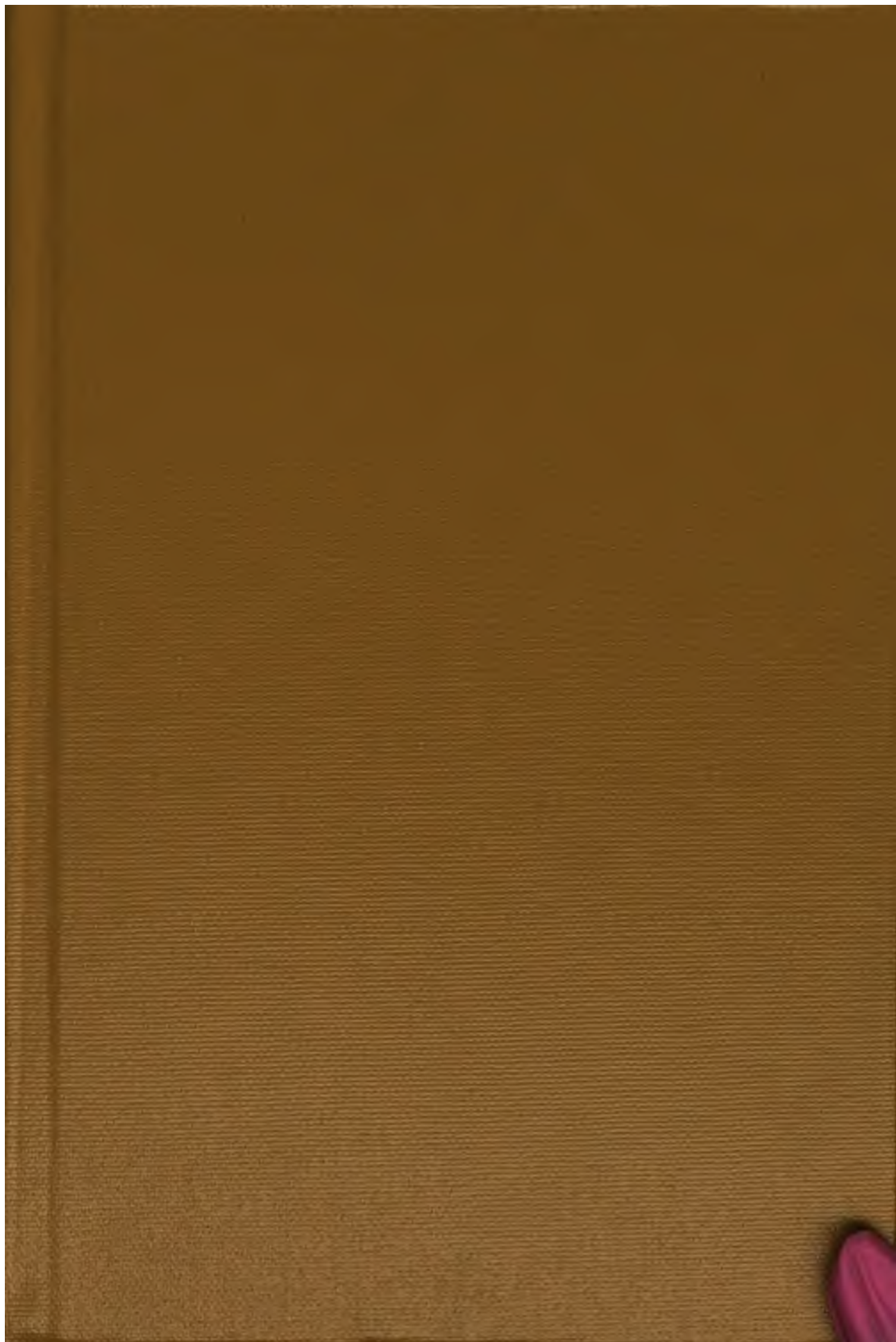
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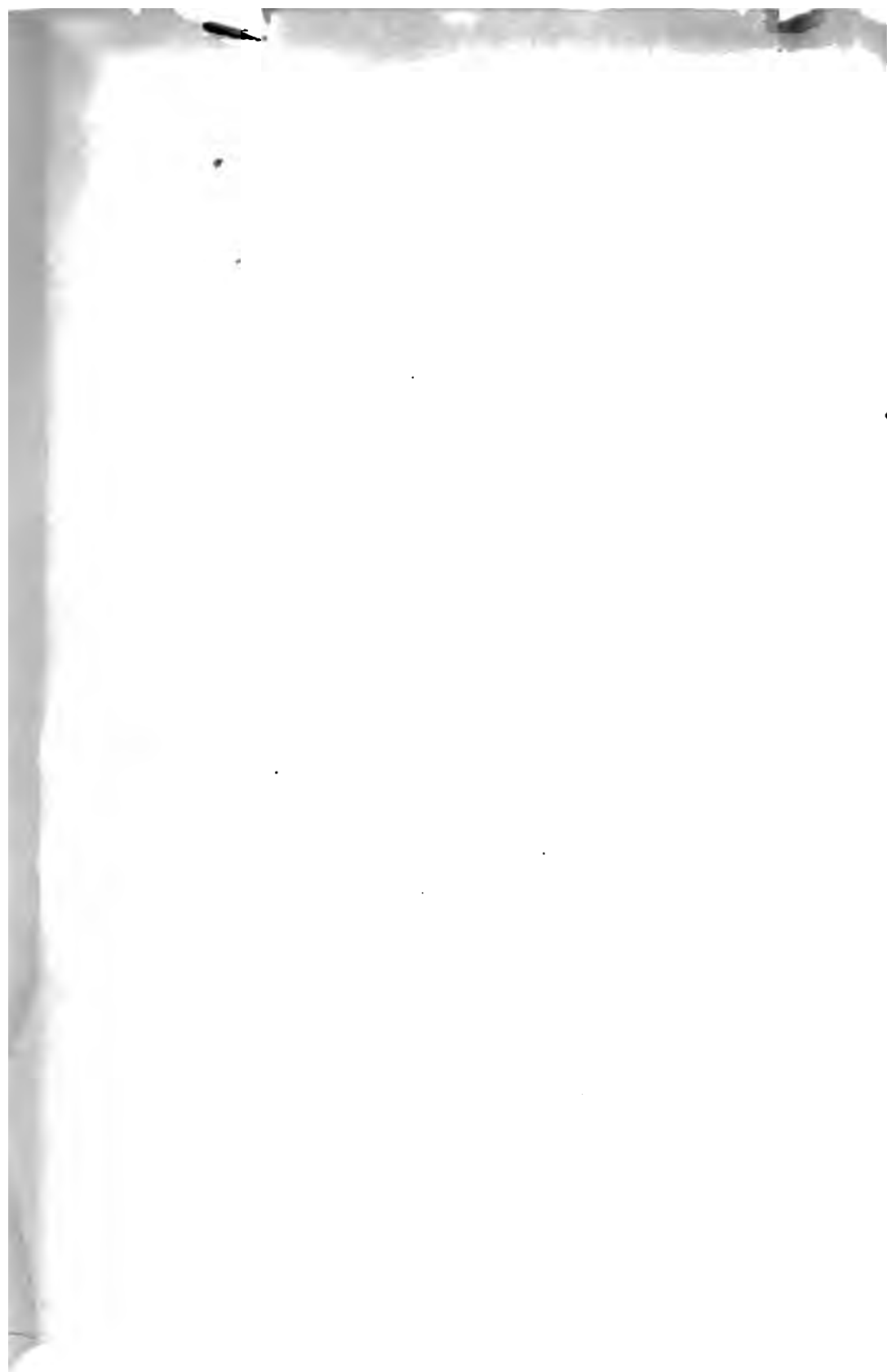


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Hubert P. Jones





W. H. L. *531.*

ADDISON ON CONTRACTS:
BEING *Parker.*
A TREATISE
ON
THE LAW OF CONTRACTS.

BY C. G. ADDISON, ESQ.,
AUTHOR OF THE "LAW OF TORTS."

EIGHTH EDITION.

BY HORACE SMITH,
OF THE INNER TEMPLE, ESQUIRE, BARRISTER-AT-LAW, RECORDER OF LINCOLN.

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ADDISON ON CONTRACTS.

VOL. II.

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THE
LAW OF CONTRACT,
ETC.

BOOK II.
(CONTINUED.)
THE LAW OF PARTICULAR CONTRACTS.

CHAPTER III.
CONTRACTS OF SECURITY.

SECTION I.
GENERAL PRINCIPLES.

The Contract of Mortgage,¹ founded upon our common law doctrine of conditions, is a contract whereby a debtor grants or conveys an estate or interest in land, or transfers goods and chattels to his creditor, subject to a proviso that, if the debt is discharged by a day named, the grant or transfer shall be void, and the debtor shall be again entitled to his lands or his goods, and shall hold them as if the grant or transfer had never been made. The debtor who makes a grant or transfer is called the mortgagor, and the creditor to whom it is made, the mortgagee. By a contract of this description the right of property in the thing mortgaged passes to the creditor, subject to be divested by the payment of the debt at the appointed time. (a)²⁰

In ancient times, lands yielding fruits and profits, and living animals and chattels bearing increase, were conveyed and trans-

¹ For additional views as to the meaning of the three terms discussed in the text, see Abb. L. Dict., *Hypotheca* and *Hypothecation*; *Mortgage*; *Pledge*.

(a) *Ryall v. Rowles*, 1 Ves. Senr. 358.

²⁰ See Appendix, Vol. III.

ferred by debtors to their creditors upon trust to apply the proceeds and profits thereof in liquidation of the debt, and, as soon as the debt was extinguished, to render them back again. This description of pledge was denominated *vivum vadium*, or a live or living pledge, because it was constantly fructifying and paying off the debt, and working its own redemption. When, on the other hand, the things transferred to the creditor, to be held as security for the due payment of the debt, yielded no profits and bore no fruits of increase, or the proceeds and profits thereof were not to be applied in liquidation of the debt, but the things themselves were to be absolutely forfeited and to become the property of the creditor in the case of the non-payment of the debt at the appointed time, it was called *mortuum vadium*, or dead pledge, and

hence the derivation of our modern term "mortgage." (b)

[* 592] * **The Contract of Pledge** is a bailment or delivery of goods and chattels by one man to another, to be held as a security for the payment of a debt or the performance of some engagement, and upon the express or implied understanding that the thing deposited is to be restored to the owner as soon as the debt is discharged or the engagement has been fulfilled. The thing deposited as a security is called a pawn or pledge; the party making the deposit, the pawner or pledgor; and the person who receives it into his possession, the pawnee or pledgee. The contract is to be distinguished from the contract of hypothecation by the transfer of the possession, or the actual tradition or delivery of the thing intended to be charged, to the creditor, (c) and from the contract of mortgage by the absence of a transfer of the ownership or right of property thereof to the pawnee during the continuance of the trust. A written memorandum of deposit or pledge, therefore, does not require a mortgage stamp; but it will in general require an agreement stamp. (d) If the thing intended to be burthened with the debt or charge remains in the possession, order, and disposition of the owner, there is no pledge. By a pledge, therefore, of goods and chattels, the right of possession is altered, but

(b) Beam's Glanville, 252.

transit possessio ad creditorem." — Dig.

(c) "Proprie pignus dicimus quod ad lib. 13, tit. 7, lex 9, sect. 2, lex 35, sect. 1. creditorem transit, hypothecam cum non

(d) Harris v. Birch, 9 M. & W. 594.

not the right of property. The pawnee, during the continuance of the contract, is the lawful possessor, and has a special property in the chattel as a bailee; but the general right of property and ownership still continue in the pawnor. (e) A *lien*, on the other hand, gives no right of property to the person entitled to it, but is merely a personal right to retain goods, and continues only so long as the holder keeps possession, either by himself or his servant. There is, therefore, no right to sell or otherwise dispose of the subject-matter of the *lien*. (f)

The distinction between the contract of pledge and the contract of hypothecation, in the Roman law, is thus marked in the Institutes: "By the term pledge is meant that which has actually been delivered to a creditor, especially if the thing was a movable; and by the word hypothecation we comprehend what is obliged to a creditor by a mere agreement without any delivery." (g) The contract of pledge, like the contract of hypothecation, is accessory to a principal debt or obligation, which may be the pawnor's own debt or obligation, or the debt or obligation of a third party. It is in all cases a security for every part of the debt * or engagement, so that if a portion [* 593] is discharged, the pledge remains as a security for the residue. (h)

The Contract of Hypothecation, as it existed among the Greeks and Romans, was a contract whereby a debtor charged certain specific property, or all his property generally, with the payment of a certain debt. It derived its name from the Greek word *ὑποθήκη*, from *ὑπό* and *τίθεσθαι*, to place under an obligation, the property being subjected to a specific charge. No right of property in the thing hypothecated was by this contract transferred to the creditor, nor any right to the possession thereof; but the debt was tacked on to the property, so that the creditor had a right to follow it through whatever hands it might happen to pass, and attach it, and sell it in satisfaction and discharge of the debt. A contract or power of this kind which enabled one

(e) *Ratcliff v. Davies*, Cro. Jac. 244;
Ryall v. Rolle, 1 Atk. 167; Bac. Abr.
Bailment (B).

(f) *Gibbs, C. J., Pothonier v. Dawson*, Holt, N. P. 385.

(g) Inst. lib. 4, tit. 6, sect. 7.

(h) *Pothier*, Nant. Nos. 43, 46; *Domat*, liv. 3, tit. 1, sect. 1.

man to have the visible ownership, and another a secret power of disposal of property, was liable to great abuse, and afforded a great temptation to fraud; and this was sought to be guarded against by making the contract public and notorious, so that all persons dealing with hypothecated property might be put upon their guard, and be furnished with the means of ascertaining the nature and extent of the charges upon it. (i) Hypothecation by the French law is either legal, judicial, or conventional. Under the term "legal hypothecation" are comprehended all such charges and liens upon property as arise by implication and intendment of law; by a judicial hypothecation is meant that description of charge or claim upon property which results from the judgments of the courts of justice, and from the judicial acts; and a conventional hypothecation is that which is founded purely upon contract. This last description of hypothecation "can only be consented to by an act passed in authentic form before two notaries, or before one notary and two witnesses." (k)

SECTION II.

MORTGAGE, ETC., OF REALTY.

Mortgage of Lands and Tenements.¹—The owner of an estate or interest in land who grants or conveys away his interest,

¹ Numerous publications in the United States during recent years give comprehensive and satisfactory accounts of the modern law of mortgage of real property. Consult Jones on Mortgages of Real Property, 3d ed., 1882. Thomas on Mortgages of Real and Personal Property in New York, 1877. Jones on Railroad Securities, 1879, especially c. 1, Power of Corporations to Mortgage their Property and Franchises; c. 2, Form and Construction of Corporate Mortgages; c. 3, Property covered by Railroad Mortgages; c. 4, Mortgages of After-acquired Property; c. 5, or of Rolling Stock; c. 6, Mortgage Bonds; c. 11, Duties and Rights of Mortgage Trustees; c. 14, 22, 23, Foreclosure of Corporate Mortgages; c. 19, 20, 21, Priority of Railroad Mortgages. Martindale on Conveyancing, 1882, c. 8, Nature and History of Mortgages; c. 9, their Form and Requisites; c. 10, Assignments; c. 11, Redemption, Payment, and Discharge; c. 12, Foreclosure. Washburn on Real Property, c. 16, Mortgages. Sheldon on Subrogation, 1882. Article by W. H. Whitaker on Subrogation of the insurer to the interest of the

(i) Sir Wm. Jones, Com. Issues.

(k) Cod. Civ. liv. 3, tit. 18, 2127.

may annex whatever condition he pleases to the grant, upon the principle that *cujus est dare, ejus est disponere*; and, therefore, if

mortgagee, 18 Am. L. Reg. n. s. 737; article on Power of sale of mortgages and trust-deeds, 3 South. L. Rev. n. s. 703; article by L. W. Keplinger on Effect of tender to discharge liens, ib. 767; article by E. McClain on Deed absolute in form, when a mortgage, 13 West. Jur. 193.

For the decisions upon real property mortgages, including all that relates to the nature, form, interpretation, and validity of the instrument, see U. S. Dig. I.-IV.; Rights and liabilities of the parties, ib. V.; Registry and notice, and priority, ib. VI.; Foreclosure, ib. VII.; Redemption, ib. VIII.; Payment, satisfaction, release, and merger, ib. IX.; Power of sale, ib. X.; Assignments, ib. XI.; Rules applicable to mortgages in common with other contracts or deeds, ib. tit. *Contracts*; ib. tit. *Deeds*; Admissibility in evidence, ib. tit. *Evidence*, sects. 1196, 2953, 6860; Admissibility of parol evidence to vary, ib. tit. *Evidence*, sect. 2953; When mortgage may be held void for fraud on creditors, ib. tit. *Fraudulent Conveyances*; Power of various corporations to mortgage, ib. tit. *Corporations*, 1262; ib. tit. *Loan Societies*, 9; ib. tit. *Building Societies*, 3; Incapacity of various individual parties, ib. tit. *Aliens*; ib. tit. *Infants*, 27; ib. tit. *Husband and Wife*, 519, 983, 2070; Mortgage of vessels, ib. tit. *Shipping*, 352, 411; also, Abb. Nat. Dig. tit. *Shipping*, II. 3, and supp.

Recent decisions on the instrument — on mortgages of realty considered as a species of written contract — are: What constitutes a mortgage in various cases. *Vance v. Lincoln*, 38 Cal. 586; *Heath v. Williams*, 30 Ind. 495; *Ruffier v. Womach*, 30 Tex. 332; *Gubbins v. Harper*, 7 Phila. 276; *McClintock v. McClintock*, 3 Brews. 76; *Cannon v. McNab*, 48 Ala. 99; *Danzeisen's Appeal*, 73 Pa. St. 65; *Halley v. Jackson*, 66 Ill. 139; *Markoe v. Andras*, 67 Ill. 34; *Fairchild v. Fairchild*, 5 Hun. 407; *Fessler's Appeal*, 75 Pa. St. 483; *Beale v. Ryan*, 40 Tex. 399; *Payne v. Patterson*, 77 Pa. St. 134; *Archambau v. Green*, 21 Minn. 520; *Webb v. Rowelton*, 4 Neb. 308; *Morrison v. Brand*, 5 Daly, 40; *Walker v. Tiffin Min. Co.*, 2 Col. T. 89; *Turner v. Watkins*, 31 Ark. 429; *Snowden v. Pitcher*, 45 Md. 260; *Pennock v. McCormick*, 120 Mass. 275; *Klock v. Walter*, 70 Ill. 416; *Cowles v. Marble*, 37 Mich. 158; *Meyer v. Dubuque County*, 49 Iowa, 487.

The form and contents of the instrument, including filling blanks and alterations. *Pennsylvania Coal Co. v. Dovey*, 64 Pa. St. 260; *Marcey v. Dunlap*, 5 Lans. 365; *Van Etta v. Evenson*, 28 Wis. 33; *Ames v. Brown*, 22 Minn. 257; *Collins v. Collins*, 51 Miss. 311; *McMannis v. Rice*, 48 Iowa, 361; *Porter v. Muller*, 53 Cal. 677.

The signing, acknowledgment, delivery, acceptance, and all matters pertaining to execution of the instrument. *Haskill v. Sevier*, 25 Ark. 152; *Brannon v. Brannon*, 2 Disney, 224; *Carrico v. Farmers', &c. Nat. Bank*, 33 Md. 235; *Walker v. Johnson*, 37 Tex. 127; *Gardner v. Moore*, 51 Ga. 268; *Amphlett v. Hibbard*, 29 Mich. 298; *Sanborn v. Robinson*, 54 N. H. 239; *Ayres v. Probasco*, 14 Kan. 175; *Bell v. Farmers' Bank*, 11 Bush, 34; *Powell v. Conant*, 33 Mich. 396; *Partridge v. Chapman*, 81 Ill. 137; *Morton v. Nichols*, 35 Mich. 148; *Van Aken v. Gleason*, 34 Mich. 477; *Gunnel v. Cockerill*, 84 Ill. 319; *Heffron v. Flanigan*, 37 Mich. 274; *Johnson v. Cadden*, 33 Ark. 600; *Merrill v. Nelson*, 18 Minn. 366; *Cutler v. Rose*, 35 Iowa, 456; *Goodwin v. Owen*, 55 Ind. 243; *Van Riswick v. Goodhue*, 50 Md. 57; *Berrigan v. Fleming*, 2 Lea, 271; *Patton v. Irvin*, 8 Baxt. 453; *Martin v. O'Bannon*, 35 Ark. 62; *Conner v. Abbott*, ib. 365; *Gunderman v. Gunnison*, 39 Mich. 313; *Clement v. Bennett*, 70 Me. 207; *Purdee v. Treat*, 18 Hun. 298; *McNamara v. Culver*, 22 Kan. 661; *Scott v. McWhirter*, 49 Iowa, 487; *Wilmerding v.*

he wants to raise money and give security for its repayment, he may grant * his estate to the lender, annexing

Mitchell, 42 N. J. L. 476; Sims v. Gaines, 64 Ala. 392; De Bruhl v. Maas, 54 Tex. 464; Barthell v. Syverson, 54 Iowa, 160; Brush v. Peterson, ib. 243. Validity of law requiring acknowledgment. Parrott v. Kumpf, 100 Ill. 428.

Interpretation and effect of various mortgages. Furbish v. Sears, 2 Cliff. 454; Schooley v. Romain, 31 Md. 574; Weaver v. Wilson, 48 Ill. 125; Blood v. White, 100 Mass. 357; Wilkins v. Sorrello, 45 Ala. 272; Griffin v. Marine Co., 52 Ill. 130; Fetrow v. Merriwether, 53 Ill. 275; Stokes v. Howerton, 67 N. C. 50; Coleman v. Van Rensselaer, 44 How. Pr. 368; Babcock v. Lisk, 57 Ill. 327; Saylor v. Saylor, 3 Heisk. 525; Johnson v. Nordyke, 35 Iowa, 257; Pullan v. Cincinnati, &c. R. R. Co., 44 Biss. 35; Price v. Gover, 40 Md. 102; Tucker v. Alger, 30 Mich. 67; Patterson v. Taylor, 15 Fla. 336; Sickmon v. Wood, 69 Ill. 329; Hauf v. Duncan, 40 Iowa, 254; First Nat. Bank v. Byard, 26 N. J. Eq. 255; Bingham v. Avery, 48 Vt. 602; Pitzer v. Burns, 7 W. Va. 63; Sebrell v. Couch, 55 Ind. 122; Vary v. Shea, 36 Mich. 388; Rosenstock v. Ortwine, 46 Md. 388; Vaughan v. Grottenkemper, 3 Tenn. Ch. 93; Allen v. Woodard, 125 Mass. 400; United States Mortgage Co. v. Gross, 93 Ill. 493; Dubois v. Fagan, 32 N. J. Eq. 183; Jones v. Parker, 51 Wis. 218; Donnan v. Intelligencer, &c. Co., 71 Mo. 221; Moffitt v. Roche, 76 Ind. 750. Interpretation and effect of the interest clause. Gulden v. O'Byrne, 7 Phila. 93; Ackens v. Winston, 22 N. J. Eq. 444; Muzzy v. Knight, 8 Kan. 76; Harper v. Ely, 56 Ill. 179; Malcolm v. Tatham, 2 Abb. App. Dec. 33; Cook v. Rogers, 5 Thomp. & C. 493; Cook v. Clark, 3 Hun, 247; Wapler v. Jones, 62 Mo. 440; Morbray v. Leckie, 42 Md. 476; Howell v. Western R. R. Co., 94 U. S. 463; Meyer v. Graeber, 19 Kan. 165; Wilcox v. Allen, 36 Mich. 160; Cook v. Clark, 68 N. Y. 178; Pope v. Hooper, 6 Neb. 178; Harrington v. Christie, 47 Iowa, 319. Of the insurance clause. Walker v. Cockney, 38 Md. 75; Miller v. Aldrich, 31 Mich. 408. Of a stipulation for payment of attorney's fees. Simon v. Haisleigh, 21 La. Ann. 607; Clawson v. Monson, 55 Ill. 394; Tholen v. Duffy, 7 Kan. 405; Schmidt v. Potter, 35 Iowa, 426; Maus v. McKellip, 38 Md. 231; Renshaw v. Richards, 3 La. Ann. Pt. I. 398; Soles v. Sheppard, 99 Ill. 616; Vosburgh v. Lay, 45 Mich. 455. Of other special stipulations. Lehman v. Marshall, 47 Ala. 362; Stewart v. Clark, 8 Kan. 210; Curtis v. Goodenow, 24 Mich. 18; Tucker v. Tucker, ib. 426; Walker v. Cockney, 38 Md. 75; Mershon v. Mershon, 9 Bush, 633; National State Bank v. Davis, 24 Ohio St. 190; Garnsey v. Rogers, 47 N. Y. 233.

Validity of mortgages as dependent on the legal capacity or authority of the lender to make the loan and take the mortgage. First Nat. Bank v. Elmore, 52 Iowa, 541; Bucklin v. Bucklin, 1 Abb. App. Dec. 242; Eacho v. Cosby, 26 Gratt. 112. Validity as dependent on sufficiency of consideration (Baldwin v. Raplee, 4 Ben. 433; Corbett v. Woodward, 5 Sawyer, 403; Senzeneau v. Saloy, 21 La. Ann. 305; Bethel v. Hawkins, ib. 620; Richard v. Beauchamp, ib. 635; Lefevre v. Haydel, ib. 663; McLaughlin v. Cosgrove, 99 Mass. 4; Uhler v. Semple, 20 N. J. Eq. 288; Richardson v. Brackett, 101 Mass. 497; Farnum v. Burnett, 21 N. J. Eq. 87; McKay v. Gillian, 65 N. C. 130; Fisher v. Meister, 24 Mich. 447; Mizner v. Kussell, 29 Mich. 229; Davidson v. King, 51 Ind. 224; Feldman v. Gamble, 26 N. J. Eq. 494; Lyman v. Babcock, 40 Wis. 503; Moore v. Fuller, 6 Oreg. 272; Micou v. Ashurst, 55 Ala. 607; Osborn v. Segras, 29 La. Ann. 291; Schumpert v. Dillard, 55 Miss. 348; Billgery v. Ferguson, 30 La. Ann. Pt. I. 84; Campbell v. Tompkins, 32 N. J. Eq. 170; Stearns v. Porter, 46 Conn. 313; Mayer v. Grottendick, 68 Ind. 1; Reynolds v. Morse, 52 Iowa, 155); especially where the intention was to secure a future advance or debt (Schuelenburg v. Martin, 1 McCrary, 348;

to such grant a condition that, if he repays the sum advanced by a day certain, the grant shall be void, and he shall be entitled

Summers v. Roos, 42 Miss. 749; *Kansas Valley Nat. Bank v. Rowell*, 2 Dill. 371; *Meza v. Generes*, 22 La. Ann. 285; *Farnum v. Burnett*, 21 N. J. Eq. 87; *Allen Lathrop*, 46 Ga. 133; *Brinkmeyer v. Browneller*, 55 Ind. 487; *Wilczinski v. Overman*, 51 Miss. 841; *Coleman v. Galbreath*, 53 Miss. 308; *Moore v. Ragland*, 74 N. C. 343; *Gardner v. Maxwell*, 27 La. Ann. 561; *Woods v. People's Nat. Bank*, 83 Pa. St. 57; *Johnson v. Anderson*, 30 Ark. 745; *Jarratt v. McDaniel*, 32 Ark. 598; *Brinkmeyer v. Helbling*, 57 Ind. 435; *Thurman v. Jenkins*, 2 Baxt. 426; *Alexandria Sav. Inst. v. Thomas*, 29 Gratt. 483; *Ackerman v. Hunsicker*, 21 Hun, 53; *McCarty v. Chalfant*, 14 W. Va. 531; *Forsyth v. Preer*, 62 Ala. 443; *Brewster v. Clamfit*, 33 Ark. 72; *Hendrix v. Gore*, 8 Oreg. 406; *Klein v. Glass*, 53 Tex. 37; *Ackerman v. Hunsicker*, 85 N. Y. 43). Validity as dependent on the nature, quality, &c. of the property mortgaged, or on the mortgagor's estate or interest in it (*Hagar v. Brainerd*, 44 Vt. 294; *McGee v. Fitzer*, 37 Tex. 27; *Hosmer v. Carter*, 68 Ill. 98; *Sumner v. Bryan*, 54 Ga. 613; *Low v. Anderson*, 41 Iowa, 476; *Bank of Greenboro v. Clapp*, 76 N. C. 482; *Van Wickle v. Landry*, 29 La. Ann. 330; *Shepard v. Shepard*, 36 Mich. 173; *Drexler v. Tyrrell*, 15 Nev. 114; *Laughlin v. Braley*, 25 Kan. 147); especially where he acquired the property after having made the mortgage (*Beall v. White*, 94 U. S. 382; *Woodbury v. Dorman*, 15 Minn. 338; *Crompton v. Pratt*, 105 Mass. 255; *White v. Butt*, 32 Iowa, 335; *Sillers v. Lester*, 48 Miss. 513; *Stevens v. Watson*, 45 How. Pr. 104; *Johnston v. Morrow*, 60 Mo. 339; *Tryon v. Munson*, 77 Pa. St. 250; *Apperson v. Moore*, 30 Ark. 56; *Driver v. Jenkins*, ib. 120; *Arques v. Wasson*, 51 Cal. 620; *Everman v. Robb*, 52 Miss. 653; *Williamson v. New Jersey Southern R. R. Co.*, 29 N. J. Eq. 311; *New Orleans Nat. Bank v. Raymond*, 29 La. Ann. 355; *Holmes v. Abrahams*, 31 N. J. Eq. 415; *Gibbons v. Hoag*, 95 Ill. 45); or where the property was a growing crop (*Butt v. Ellett*, 19 Wall. 544; *Ellett v. Butt*, 1 Woods, 214; *McGee v. Fitzer*, 37 Tex. 27; *Duke v. Strickland*, 43 Ind. 494; *Booker v. Jones*, 55 Ala. 266; *Bell v. Radcliff*, 32 Ark. 645; *Valentine v. Washington*, 33 Ark. 795; *Sentell v. Moore*, 34 Ark. 687; *Wasson v. Connor*, 54 Miss. 351; *Hunt v. Shackelford*, 56 Miss. 397; *Cotten v. Willoughby*, 83 N. C. 75; *Harris v. Jones*, ib. 317; *Hansen v. Dennison*, 7 Ill. App. 73; *Rankin v. Kinsey*, ib. 215; *Rider v. Edgar*, 54 Cal. 127; *Paxton v. Meyer*, 58 Miss. 445). Validity as affected by defects in the designation or description of either of the parties (*Swan v. Vogel*, 31 La. Ann. 38; *Schumpert v. Dillard*, 55 Miss. 348); or in the description of the note, bond, or evidence of debt intended to be secured (*Pearce v. Hall*, 12 Bush, 209; *Paine v. Benton*, 32 Wis. 491; *Kellogg v. Frazier*, 40 Iowa, 502; *Aull v. Lee*, 61 Mo. 160; *Cleavenger v. Beath*, 53 Ind. 172; *Boyd v. Packer*, 43 Md. 182; *Williams v. Mackubin*, 52 Md. 357); or in the description of the premises mortgaged (*City Nat. Bank v. Barrow*, 21 La. Ann. 296; *Nolte v. Libbert*, 34 Ind. 163; *Bowen v. Wood*, 35 Ind. 268; *Consolidated Assoc. v. Mason*, 24 La. Ann. 518; *Simmons v. Fuller*, 17 Minn. 485; *Mervin v. Murphy*, 35 Tex. 787; *Teetshorn v. Hull*, 30 Wis. 162; *Cochran v. Utt*, 42 Ind. 267; *Eggleston v. Watson*, 53 Miss. 339; *Usina v. Wilder*, 58 Ga. 178; *Frey v. Drahos*, 6 Neb. 1; *Herman v. Deming*, 44 Conn. 124; *Murphy v. Hendricks*, 57 Ind. 593; *Thorndill v. Burthe*, 29 La. Ann. 639; *Slater v. Breese*, 36 Mich. 77; *Boon v. Pierpont*, 28 N. J. Eq. 7; *Clark v. Davis*, 32 N. J. Eq. 530; *Reynolds v. Spencer*, 66 Ind. 145; *Reynolds v. Morse*, 52 Iowa, 155; *Mahoney v. Mackubin*, 52 Md. 357; *Adams v. Commercial Bank*, 53 Iowa, 491; *Mellick v. Dayton*, 34 N. J. Eq. 245). Validity of special clauses and stipulations. *Nelson v. Everett*, 29 Iowa, 124; *Williams v. Meeher*, ib. 292; *Jones v. Schuermeyer*, 39 Ind.

to re-enter and re-possess the land. When lands or tenements are granted to be holden by the grantee and his heirs and assigns for ever, subject to such a condition, the grant is a mortgage in fee; when they are granted to be holden for a term of years, it is a mortgage for a term of years. In either case the estate granted is a defeasible estate. If the act to be done is performed at the appointed period, the grant or demise is at an end, and the grantor is seised or possessed of his old estate; if it is not performed, the grantee holds the estate discharged of the condition, and becomes the legal owner of the estate in the property, in accordance with the strict terms and stipulations of the contract. In the first case, the estate is re-vested in the mortgagor by the mere performance of the condition; in the latter, it cannot be re-vested in him without a fresh conveyance from the mortgagee. If by the terms of the contract the mortgagor is to remain in possession of the property and receive the rents and profits thereof until the day of payment, or for any determined period, he becomes tenant to the mortgagee, and there is a demise of the premises for the intervening period. (l) If, on the other hand, there is no term or stipulation in the contract clothing the mortgagor with the right of possession until the time of payment has arrived, the mortgagee has the right of possession as well as the right of property the instant the mortgage is executed, and may, when the mortgagor is himself the occupier of the mortgaged property, enter upon and take possession of the mortgaged premises, or enforce such right through the medium of an action. (m)

119; *Whitmore v. Reynolds*, 46 Cal. 380; *Standcliff v. Morton*, 11 Kan. 218; *Sharp v. Barker*, ib. 381; *Maus v. McKellip*, 38 Md. 231; *Emmons v. Hinderer*, 24 N. J. Eq. 39; *Foote v. Sprague*, 13 Kan. 155; *Quartermons v. Kennedy*, 29 Ark. 544; *Danforth v. Charles*, 1 Dak. T. 285; *Munter v. Lynn*, 61 Ala. 492; *Chaffe v. Hughes*, 57 Miss. 256; *Hazeltine v. Branger*, 44 Mich. 503; *Soles v. Sheppard*, 99 Ill. 616.

Liability of a borrower who procured a loan by promising to give a mortgage, but afterward refused to give it. *Dickerson v. Merriman*, 100 Ill. 342.

(l) *Wilkinson v. Hall*, 3 Bing. N. C. 895; *Doe v. Lightfoot*, 8 M. & W. 553; 508; 4 Sc. 301; *Doe v. Goldwin*, 2 Q. B. *Doe v. Maisey*, 8 B. & C. 767; *Doe v. 143*; *Partridge v. Bere*, 1 D. & R. 272; *Giles*, 2 Moo. & P. 749; *Doe v. Day*, 2 5 B. & Ald. 604. Q. B. 147.

(m) *Rogers v. Grazebrook*, 8 Q. B.

If the mortgaged money is tendered at any period of the day appointed for the payment of it, the condition is saved for ever, the grant is void, and the mortgagor has a right to re-enter and hold the land as of his former estate. (*n*) If a lease is assigned by way of mortgage, the mortgagee will be liable, as the assignee of the term, to all covenants in the original lease running with the land, although he never entered or took actual possession of the estate. (*o*) The existence of the mortgage does not deprive the mortgagee of his remedies as a creditor against the mortgagor personally for the recovery of the debt secured by the mortgage. If, therefore, the mortgage deed contains no covenant for the * repayment of the money advanced, an action for [* 595] money lent will lie. (*p*) The delivery up of the mortgage deed will not of itself cancel the mortgage debt. (*q*)

A security for money lent may be made in the form of a conveyance upon trust to sell, and although in such a case some of the incidents of a mortgage are not present (as, for instance, a right to foreclose), yet in substance the conveyance is a mortgage. (*r*)

A form of statutory mortgage is given in Third Schedule, Part I., of the Conveyancing and Law of Property Act, 1881, to which form covenants are attached by sects. 26 and 28, and modes and conditions of transfer, and re-conveyance by sects. 27 and 29. (*s*)

Rights of the Mortgagee when the Mortgagor is in Occupation of the Mortgaged Premises.¹ — The courts will not infer from the mere insertion in the mortgage deed of a covenant on the part of the mortgagor that it shall be lawful for the mortgagee, *after*

¹ For the rights and liabilities of mortgagor and mortgagee in such matters as are treated in this and the eight next following paragraphs of the text, most of which arise by operation of law rather than from any express contract, see Jones. *Mortg.*; Thomas, *Mortg.*; U. S. Dig. tit. *Mortgages*, V.; U. S. Ann. Dig. 1870-78, tit. *Mortgages*, I. 4; ib. 1879, &c., tit. *Mortgages*, I. d. e. f.; Scott v. Ware, 65 Ala. 174; Crain v. McGoon, 18 Am. L. Reg. n. s. 178, and note, ib. 182; Moshier v. Norton, 100 Ill. 63; Humphreys v. Morton, ib. 592; Smyth v. Knickerbocker Life Ins. Co., 84 N. Y. 589.

(*n*) Bac. Abr. *Mortgage*, 637; *Condition*, 141, 144-146; Co. Litt. 218, 219. but see Painter v. Abel, 9 Jur. n. s. 949, 950.

(*o*) Williams v. Bosanquet, 1 B. & B. 238.

(*q*) Hurst v. Beach, 5 Mad. 351.

(*r*) In re Alison, 11 Ch. D. 284.

(*p*) Yates v. Aston, 4 Q. B. 182; Mathew v. Blackmore, 1 H. & N. 762;

(*s*) 44 & 45 Vict. c. 41, sects. 26-29; also as to what covenants are in future to be implied in a mortgage, see sect. 7 (C).

default made in payment of the debt at the time appointed, or after giving "one month's notice," to enter upon the mortgaged lands, any covenant on the part of the mortgagee that it shall be lawful for the mortgagor to retain possession until default made; and such a covenant does not, consequently, prevent the mortgagee from entering immediately after the execution of the mortgage; (t) but if from the mutual covenants of the parties and the general context of the deed it appears to have been plainly intended that the mortgagor should have possession until default, the courts will give effect to such intention. (u) Whenever the mortgagor is merely permitted to occupy the mortgaged premises or to receive the rents and profits thereof, without being expressly clothed with the right of possession, he possesses the premises at sufferance in the strictest sense; and, therefore, no notice is ever given him to quit, and he is not even entitled to reap the crop he has sown. So far as regards the possession of the land, he is not even tenant at will to the mortgagee; but he receives the profits of the land for his own use, and not as an agent or bailiff of the mortgagee; and when he has once received them, he is entitled to keep them as his own. If by the mortgage deed power is given to the mortgagee to enter upon the premises and distrain for interest in arrear, in like manner as for rent reserved on a lease, the exercise of the power is no recognition of the mortgagor as tenant or lessee, and does not preclude the mortgagee from bringing an action of ejectment without [* 596] demand of possession or notice to quit. (x) A power of distress of this sort, being a mere personal license to enter and distrain, is not assignable over. (y) But if a tenancy is created, the power is annexed to the tenancy, and goes with the reversion. (z)

When the Mortgagor becomes Tenant to the Mortgagee. — If the mortgage deed contains a clause whereby the mortgagor attorns and becomes tenant to the mortgagee at a specified annual

(t) *Doe v. Lightfoot*, 8 M. & W. 564; *Doe v. Day*, 2 Q. B. 147; *Rogers v. Grazebrook*, 8 Q. B. 895. (x) *Doe v. Goodier*, 16 L. J. Q. B. 435.

(y) *Brown v. Metropolitan Counties Life Assurance Co.*, 28 L. J. Q. B. 236.

(u) *Wheeler v. Montefiore*, 2 Q. B. 142. (z) *Jolly v. Arbuthnot*, 28 L. J. Ch. 547.

rent, payable half-yearly so long as the mortgage money remains secured upon the mortgaged premises, and the mortgagor continues in the occupation of the mortgaged premises and pays rent, the subsequent occupation, taken in connection with the clause of attornment, constitutes the relation of landlord and tenant between the parties, and the mortgagee may distrain for the rent, although he never himself executed the mortgage deed. (a) And this is so though there may have been a prior mortgage and attornment to another mortgagee. (b) Such attornment clause must be *bona fide*, and not merely for the purpose of enabling the mortgagee to oust the creditors. (c) The proceeds of a distress for rent under an attornment clause are applicable to the payment of principal as well as interest. (d) When the mortgage deed contains a clause of this description, a right of entry should be reserved in default of payment of the rent, so as to enable the mortgagee, in case the rent remains unpaid, to enter upon the lands or bring an action of ejectment, without giving a notice to quit. (e) If by the terms of the mortgage deed the mortgagor is to hold possession for any certain or determined period, there will then be a demise to him of the mortgaged estate for the term specified. If he is to hold until the happening of some uncertain event, he will have a conditional estate, and will be tenant to the mortgagee until the event has happened. If the mortgage deed contains a clause of attornment, or creates a tenancy as between the mortgagor and mortgagee, but does not create any definite or certain term of holding, the mortgagor will be tenant at will. The reservation of a yearly rent is not inconsistent with a tenancy at will (*ante*, p. * 219). Therefore a clause in a mortgage deed that the mortgagor shall become tenant to the mortgagee at a yearly rent, does not necessarily create a yearly tenancy. (f) If by the mortgage deed it is *covenanted or agreed that the mortgagor [* 597]

(a) *West v. Fritche*, 3 Exch. 216; *Morton v. Woods*, L. R. 3 Q. B. 658; *ib.* 4 Q. B. 302; 37 L. J. Q. B. 242; 38 *ib.* 81; *In re Threlfall*, 16 Ch. D. 274. (d) *Ex parte Harrison*, 18 Ch. D. 127. (e) *Doe v. Tom*, 4 Q. B. 615; *Metropolitan Counties Assurance Co. v. Brown*, 4 H. & N. 434; 28 L. J. Ex. 340. (f) *Doe v. Davies*, 7 Exch. 89; 21 L. J. Ex. 60; *Doe v. Goldwin*, 2 Q. B. 226. (c) *Ex parte Jackson*, 14 Ch. D. 725. 143.

shall hold as tenant at will to the mortgagee at an annual rent recoverable by distress, and the mortgagor demises the premises to a third party, the tenancy at will is not determined, and the mortgagee is not deprived of his right to distrain. (g) Where it was provided that in case of default in payment the mortgagor should hold the premises as yearly tenant to the mortgagees from the date of the deed at a specified rent, and that they should have the same remedies for recovering the rent as if the same had been reserved upon a common lease, and, the mortgagor having made default, the mortgagees, after the lapse of more than a year from the default, distrained as for a year's rent in arrear, it was held that, not having given him any notice of their intention to treat him as tenant, they were not entitled to distrain. (h)

When the Mortgaged Premises are in the Possession and Occupation of Lessees or tenants holding under leases granted by the mortgagor prior to the making of the mortgage, the mortgagee of course takes the mortgaged premises subject to those leases. The mortgage in such a case operates as a grant of the reversion, and with it of the rent; and the mortgagee is entitled, as assignee of the reversion, to the rent reserved on such leases after he has given the lessees notice of the mortgage, and required them to pay their rents to him. Though attornment is no longer necessary to perfect the title of a mortgagee of the reversion to the rent reserved on the demise, yet notice of the grant or mortgage must be given to the tenants to enable the mortgagee to maintain an action against them for use and occupation, or to distrain for arrears of rent. (i) When there is no clause in the mortgage deed giving to the mortgagor a right to the possession of the mortgaged premises, and creating a tenancy between the mortgagor and mortgagee, the mortgagee has a right to all the rents which have become due subsequently to the making of his mortgage, and which are unpaid at the time the occupying tenant

(g) *Pinhorn v. Souster*, 8 Exch. 763; 22 L. J. Ex. 266; *Brown v. Metropolitan Counties Assurance Co.*, 28 L. J. Q. B. 236. (i) 4 & 5 Anne, c. 16, sects. 9, 10; *Moss v. Gallimore*, 1 Doug. 279; 1 Smith's L. C. 543; *Lumley v. Hodgson*, 16 East, 99. See *Allcock v. Moorhouse*, 9 Q. B. D. 366.

(h) *Clowes v. Hughes*, L. R. 5 Ex. 160; 39 L. J. Ex. 62.

from whom such rent is due receives notice of the mortgage. The tenant is not bound to pay the mortgagee without notice; and if at the time he receives notice he has paid the rent to the mortgagor, it is a good excuse for him; (*k*) but payment of the rent to the mortgagor before it is due is no answer to a claim by the mortgagee for rent which has accrued due after the giving of the notice. (*l*) When lands in the *possession [* 598] of tenants holding underleases have been mortgaged, the mortgagee, as assignee of the reversion, may sue on any of the covenants which are annexed to the reversion and run with the land; and he is also liable to be sued thereon. Hence it followed that whenever a man had demised to a tenant at a rent, and then had mortgaged his reversion, the mortgagor could not bring an action of ejectment nor an action for the rent in his own name, nor sue upon any covenants running with the land, whether the mortgagee had or had not given notice of the mortgage, for the tenant might avail himself of the defence that the lessor had assigned all his estate and interest in the demised premises. (*m*) But by the Supreme Court of Judicature Act, (*n*) a "mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person." And if the mortgagee does not give notice to the tenant to pay the rent to himself, but permits the mortgagor to go on receiving the rent as before the mortgage was made, and does not think fit to interfere with the tenancy, the mortgagor is deemed in law to have authority from the mortgagee to distrain for the rent if it falls

(*k*) Buller, J., *Birch v. Wright*, 1 T. R. 384, 385.

(*l*) *De Nicholls v. Saunders*, L. R. 5 C. P. 589; 39 L. J. C. P. 297; *Cook v. Guerra*, L. R. 7 C. P. 132; 41 L. J. C. P. 89; *ante*, p. * 223.

(*m*) *Doe v. Edwards*, 5 B. & Ad. 1065; *Mountnoy v. Collier*, 1 Ell. & Bl. 636.

(*n*) 36 & 37 Vict. c. 66, sect. 25 (5).

into arrear, the rent being the obvious and natural source for the mortgagor to obtain funds from to enable him to pay the interest of the mortgage debt. He may distrain in the mortgagee's name as the mortgagee's bailiff; and if he distrains in his own name, he may justify in the name of the mortgagee. (*o*)

Leases by the Mortgagor and Mortgagee after the Making of the Mortgage. — If no right of possession is reserved by the mortgage deed to the mortgagor, and no tenancy is created between him and the mortgagee, and the mortgagor remains in possession on sufferance after the making of the mortgage, and demises the mortgaged land to a tenant at a rent, the demise is absolutely void as against the mortgagee; but it is nevertheless valid, by estoppel, as between the mortgagor and his tenant, until the mortgagee interferes, and the mortgagor is entitled to receive the rent for his own use, and to distrain for it in his own name, if it is not *paid when due, so that a tenant who has come in under the mortgagor after the mortgage, and has neither paid rent to the mortgagee nor been evicted by him, either actually or constructively, before the day of payment, cannot defend an action by the mortgagor for that rent. Mere notice by the mortgagee to the tenant to pay the rent to the mortgagee is not an attornment to the latter, and is, without actual payment, no answer to the claim for rent. (*p*) And if the mortgagor assigns his interest, such as it is, his assignee has the same title by estoppel against the lessee, and, as assignee of the reversion by estoppel, may sue the tenant for waste in breach of the covenants in the lease. (*q*) As between himself and the tenant, the mortgagor may exercise all the ordinary rights of a landlord, unless the mortgagee interferes to prevent him; for the lessee cannot deny the title of his lessor at the time of granting the lease. (*r*) But the tenant who comes in under such a demise may be treated by the mortgagee as a trespasser, and may be ejected without any notice to quit, (*s*) unless the mortgagee is a

(*o*) *Trent v. Hunt*, 9 Exch. 14; 22 L. J. Ex. 320; *Snell v. Finch*, 9 Jur. n. s. 333.

(*p*) *Hickman v. Machin*, 4 H. & N. 720; 28 L. J. Ex. 310.

(*q*) *Cuthbertson v. Irving*, 29 L. J. Ex. 485; 6 H. & N. 135.

(*r*) *Wheeler v. Branscombe*, 5 Q. B. 373; *Wilton v. Dunn*, 17 Q. B. 294.

(*s*) *Keech v. Hall*, 1 Doug. 21; *Thunder v. Belcher*, 3 East, 449.

party to, or has authorized the making of, the lease; or he may be converted into a tenant to the mortgagee by continuing to occupy the mortgaged premises by the sufferance and permission of the mortgagee, after he has received notice of the mortgage. The mortgagee cannot by giving notice to the tenant entitle himself to distrain for the rent that the tenant has contracted to pay to the mortgagor, nor can he sue for any arrears of such rent. (*t*) But if there is a clause in the mortgage deed creating a tenancy as between himself and the mortgagor at a specified rent, he may, of course, distrain on the mortgaged premises for that rent. And if rent is due on a demise from the mortgagee to the mortgagor after the making of the mortgage, and the mortgagee threatens to distrain for such rent or to evict the tenant, and the latter pays the rent to avoid the threatened distress or eviction, such payment is a good payment as against the mortgagor, on the ground that the tenant has been compelled to pay for the mortgagor what the mortgagor ought himself to have paid. (*u*)

By the Conveyancing and Law of Property Act, 1881, a mortgagor in possession and a mortgagee in possession have, as against incumbrancers, power to make agricultural or occupation * leases (*x*) for twenty-one years, and building [* 600] leases for ninety-nine years, (*y*) if made according to the provisions of the section. (*z*) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease, if granted, would be binding. (*a*)

Notice of the Mortgage to the Lessee creates a new tenancy between the tenant and the mortgagee, and enables the latter to sue for a reasonable satisfaction for the use and occupation of the property by the tenant subsequent to the receipt by him of the

(*t*) *Rogers v. Humphreys*, 4 Ad. & E. 299; *Wilton v. Dunn*, 21 L. J. Q. B. 63; *Turner v. Cameron's Coal, &c.*, 5 Exch. 932. the mortgagor with the concurrence of the incumbrancers without the act, sect. 18 (15).

(*u*) *Johnson v. Jones*, 9 Ad. & E. 809; *Mayor of Poole v. Whitt*, 15 M. & W. 577. (*z*) 44 & 45 Vict. c. 41, sect. 18. This section only applies when no contrary intention is expressed in writing (13) (14).

(*x*) Any letting or agreement to let in writing or not; see sect. 18 (17). (*y*) Leases are not to be made for a longer term or on any conditions except such as could be granted or imposed by (*a*) Sect. 18 (12). The section only applies to mortgages after the act; but it may be agreed to apply it to those before the act, so as not prejudicially to affect any right of a mortgagee not adopting the agreement.

notice. (b) If the mortgagee gives the tenant notice to pay his rent to him, and the tenant continues in possession after the receipt of the notice, he will be deemed to hold as tenant at will to the mortgagee at the rent reserved in the lease; but as soon as rent has been paid to and accepted by the mortgagee, the tenancy will be converted into a yearly tenancy. (c) A mortgagee who gives notice of the mortgage to a tenant let into possession by the mortgagor subsequently to the making of the mortgage, cannot maintain an action for mesne profits in respect of the occupation of the land by such tenant prior to the receipt of the notice; for the doctrine of relation applies only as between disseisor and disseisee, and an estate which was lawful at its commencement cannot be made tortious by a subsequent act. (d) Neither can the mortgagee maintain an action against such tenant for the recovery of any satisfaction in respect of the use and occupation of the mortgaged property prior to the receipt of the notice; for there is no contract between the mortgagee and the tenant before notice of the mortgage. (e)

Equity of Redemption of the Mortgagor. — Equity, looking at the substance and not at the form of the contract of mortgage, regards it as a mere pledge of land to secure the payment of a debt, and will not, consequently, suffer the land to be forfeited by reason of the non-payment of the mortgage debt at the exact time or place or in the particular mode specified. The mortgagor is considered to be the owner of the equitable estate, and to be entitled to redeem the estate on payment of the mortgage debt and interest, until his right of redemption has been barred [* 601] by a decree of foreclosure. The *equitable interest in the land is denominated "the equity of redemption," and is, in truth, the mortgagor's old estate, unaffected in equity by the legal forfeiture, but encumbered with the lien of the pledgee. There may be a seisin of it just the same as of any other estate. It may be devised, granted, mortgaged, or entailed with remainders; (f) and it will follow the same line of descent as the land

(b) *Waddilove v. Barnett*, 2 Bing. N. C. 543; *Carpenter v. Parker*, 3 C. B. N. s. 237; 27 L. J. C. P. 78

(c) *Doe v. Bucknell*, 8 C. & P. 566; *Brown v. Storey*, 1 Sc. N. R. 16.

(d) *Litchfield v. Ready*, 5 Exch. 944; *Buller, J.*, 1 T. R. 382.

(e) *Turner v. Cameron's Coal, &c.*, 5 Exch. 932.

(f) *Casborne v. Scarfe*, 1 Atk. 605.

itself would have followed if no mortgage had been made. Thus, if the mortgaged land be of gavelkind tenure, the equity of redemption will be divisible amongst the heirs of the mortgagor; if, on the other hand, the tenure be Borough-English, the equity of redemption will descend to the youngest son. (*g*)

Equity treats every contract as a pledge which is, in principle and effect, a pledge, whatever name the parties may choose to give to the transaction, and whatever may be the disguises resorted to for concealing the real nature of the contract. Therefore, if an estate is conveyed in consideration of a sum of money, and the conveyance appears upon the face of it to be an absolute sale and conveyance, but is accompanied by a contemporaneous deed, whereby the grantee covenants to reconvey the property to the grantor by a day named, on repayment of the consideration-money and the expenses of the conveyance, the transaction will be treated as a pledge of land to secure payment of a debt, and the grantor will be admitted to redeem long after the time appointed for the re-conveyance has elapsed. (*h*) But if the parties intended an absolute sale, a contemporaneous agreement for a re-purchase, not acted upon, will not, of itself, entitle the vendor to treat the transaction as a pledge, and to redeem. "The question always is: Was the original transaction a *bona fide* sale, with a contract for a re-purchase; or was it a mortgage under the form of a sale?" (*i*) Whenever a transfer of property has been made to trustees upon trusts which are, in principle and effect, to secure, by sale or other means, the repayment of money advanced, the transfer will be deemed a pledge, and the right of redemption will exist; and a contract which is once a pledge will be always so, until the right of redemption has been extinguished by foreclosure or by the statute of limitations, or has been released by a *bona fide* contract made subsequently to the mortgage. (*k*)

The mortgagor's right to redeem cannot be clogged or extin-

(*g*) *Fawcett v. Lowther*, 2 Ves. Sen. 303; *Dixon v. Saville*, 1 Bro. C. C. 326. *love v. Bale*, 2 Vern. 84; see also *In re Alison*, p. *604.

(*i*) *Williams v. Owen*, 5 Myl. & Cr. 303; *Barrell v. Sabine*, 1 Vern. 268.

(*h*) *Williams v. Owen*, 10 Sim. 386; *Sevier v. Greenway*, 19 Ves. 413; *Man-* (*k*) *Jason v. Eyres*, 2 Ch. C. 33; *Bell v. Carter*, 22 L. J. Ch. 933.

guished by any collateral agreement entered into contemporaneously with the mortgage. If, therefore, the mortgagee [* 602] enters * into a contract with the mortgagor at the time of the loan of the money for the absolute purchase of the lands for a specific sum in case of default made in payment of the purchase-money at an appointed time, the contract will be set aside as being oppressive to the debtor, who is rarely prepared to discharge the debt at the exact time appointed. (l) The courts view transactions between mortgagor and mortgagee with considerable jealousy, and will set aside the sale of the equity of redemption where, by the influence of his position, the mortgagee has purchased for less than others would have given, and where there are circumstances of misconduct in obtaining the purchase; (m) and it has been said that a lease obtained by the mortgagee from the mortgagor is more objectionable than the purchase of the entire equity of redemption. (n) But an agreement to give the mortgagee a preference of pre-emption in case of sale is valid, and will be enforced; (o) and a *bona fide* purchase of the equity of redemption effected subsequently to the mortgage will be upheld. (p) Whenever a covenant is made by the mortgagor for further assurance, the latter can only be called upon to confirm the mortgage. (q) If an express clause of redemption is inserted in a mortgage-deed, this is not a power of revocation, or a condition, &c., for the benefit of the grantor, within the meaning of the Mortmain Acts. (r) Any person interested in the equity of redemption is entitled to redeem, and if, being so interested, he tenders the mortgage money and interest, he is entitled to the delivery of the title-deeds and to have a conveyance of the property. (s) But the mortgagee is not bound to accept payment from a stranger who has no title to redeem. (t) It seems that, in the case of a purchase from the owner of an equity of redemption in which the purchase-money is partly applied in paying off incumbrances, the purchaser with

(l) Price v. Perrie, 2 Freem. 258;
Jennings v. Ward, 2 Vern. 520.

(m) Webb v. Rorke, 2 Sch. & Lef. 36.
661; Ford v. Olden, L. R. 3 Eq. 461.

(n) Hickes v. Cooke, 4 Dow. 16.

(o) Orby v. Trigg, 2 Eq. Ca. Abr. 599.

(p) 15 Vin. Abr. 468, pl. 8.

(q) Atkyns v. Uton, 1 Lord Raym.

(r) Doe v. Hawkins, 2 Q. B. 212.

(s) Pearce v. Morris, L. R. 5 Ch. 227.

(t) James v. Bion, 3 Sw. 234.

notice of other incumbrances is not entitled as against them to say that the incumbrances so paid off are not extinguished. (*u*) But this doctrine only applies where there has been no contemporaneous expression of an intention to the contrary, and is not to be extended. (*x*)

Rights of Mortgagees.— Viewing the contract always as a pledge, equity recognizes the mortgagee's right, as pledgee, to the possession of the mortgaged estate, and will not * interfere with any proceedings that may be taken by [* 603] him to obtain possession of the mortgaged premises; but it will not suffer him, whilst in possession, to enter into any contract inconsistent with his limited interest as pledgee, or which will in anywise prejudice or interfere with the mortgagor's right of redemption. The mortgagee cannot, consequently, before a decree of foreclosure has been pronounced, grant a lease, so as to bind the mortgagor, without the consent of the latter, except under an apparent necessity and for the purpose of avoiding an apparent loss; (*y*) nor, in the case of a mortgage of a renewable lease, can he release the right to renew. (*z*) And when an advowson is the subject of mortgage, the mortgagee cannot nominate on an avoidance of the church, but the right of presentation remains vested in the mortgagor; nor can any agreement be made to the contrary, as such an agreement is inconsistent with the nature and character of a pledge. (*a*) In the simple character of a pledgee of the estate, the mortgagee will be made amenable for all negligence and misconduct amounting to a breach of trust. If, therefore, he assigns his legal estate as mortgagee to a person in insolvent circumstances, he will be compelled to account for the rents and profits of the land as well after as before the assignment. (*b*) He will be bound, moreover, as pledgee of the estate, to take the same care of it as every prudent and cautious owner is in the habit of taking of his own property. He will be made responsible for waste and for all

(*u*) *Toulmin v. Steere*, 3 Mer. 210.

(*z*) *O'Reilly v. Featherstone*, 4 Bligh,

(*x*) *Adams v. Angel*, 5 Ch. D. 634, *x*. s. 161.

C. A.

(*a*) *Mackenzie v. Robinson*, 3 Atk.

(*y*) *Hungerford v. Clay*, 9 Mod. 1. 558; *Gardiner v. Griffith*, 2 P. Wms. But see now, 44 & 45 Vict. c. 41, sect. 404.

18, *ante*, p. * 599.

(*b*) 1 Eq. Ca. Abr. 327.

damage done to the property from pulling down buildings, unless the buildings were old and ruinous, and required removal. (c) He will be responsible also for cutting down timber, unless the security was defective, in which case he may fell it and sell it, and apply the proceeds in liquidating the mortgage-debt and interest. (d) When the mortgagor is left in possession of the mortgaged property, and receives the rents and profits thereof, he is not bound to render any account of such rents and profits to the mortgagee; (e) yet equity, regarding the land as hypothecated for the mortgage-debt, will restrain the mortgagor from exercising his rights of ownership so as to deteriorate the value of the property and diminish the security of the creditor, and will, consequently, prevent him from cutting down timber, pulling down buildings, breaking up pasture land, and committing waste; and if he fells timber, an account will be de-
[* 604] creed, and the produce applied, first *in payment of the interest, and then in liquidation of the principal. (f)

Various rights and powers are given to mortgagees by the Conveyancing and Law of Property Act, 1881, sects. 19-24, as to sell, insure, appoint a receiver, cut timber in cases where the deed is made after the act; and such powers are only conferred to the same extent as if they had been in the deed, and they may be varied by the deed, and are subject to its terms. (g)

Of the Time within which the Right of Redemption may be exercised.—A suit to redeem a mortgage must be brought within twenty years (now twelve years; see 37 & 38 Vict. c. 57, sect. 7) next after the time at which the mortgagee obtained possession or receipt of the rents or profits of any land, (h) unless in the mean time an acknowledgment of the title of the mortgagor, or of his right to redemption, has been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, *in writing*, signed by the mortgagee or some

(c) *Hanson v. Derby*, 2 Vern. 392; *Hardy v. Reeves*, 4 Ves. 480.

(d) *Witherington v. Banks*, Sel. C. C. 31.

(e) *Colman v. Duke of St. Albans*, 3 Ves. 26; *Ex parte Wilson*, 2 Ves. & B. 252; *Thomas v. Brigstocke*, 4 Russ. 64.

(f) *Farrant v. Lovell*, 3 Atk. 723; *Robinson v. Litton*, *ib.* 210.

(g) 44 & 45 Vict. c. 41, sect. 19. As to leases by mortgagees, see *ante*, p. *599.

(h) Possession of part of the land is sufficient; see *Kinsman v. Rouse*, 17 Ch. D. 104.

person claiming through him; (e) in which case the suit must be brought within twenty (now twelve) years after the last acknowledgment. If there are several mortgagors, or several persons entitled to redeem, an acknowledgment given to one is an acknowledgment to all; but where there are several mortgagees, or assignees of mortgagees, an acknowledgment signed by one is effectual only against the party signing it, where the latter has a divided interest in the mode pointed out in the statute. Where their interest is joint, the acknowledgment of one mortgagee is wholly inoperative. (k) If the mortgagor permits the mortgagee to hold possession of the mortgaged premises, and receive the rents thereof for twenty (now twelve) years without accounting in the character of mortgagee, (l) and without admitting in writing the mortgagor's title, the right of redemption is barred, and the mortgagee becomes the absolute owner; (m) and when a title is once acquired, a subsequent acknowledgment will not take the case out of the statute. (n) Where the mortgagee is also tenant for life of the mortgaged estate, the statute of limitations does not begin to run against the mortgagor's title until the death of such mortgagee. (o) Where the plaintiff, in a *suit of [* 605] redemption, did not pay the principal and interest at the time appointed by the court, he was not allowed to redeem, although before the motion to dismiss was made he had tendered the amount reported to be due with the subsequent interest. (p) A mortgagee has no right to show the title of his mortgagor, and cannot be compelled to state the contents of his title-deeds; (q) and he is not bound to produce his mortgage-deed to the devisee of the mortgaged estate until payment of principal and interest. (r)

(i) 3 & 4 Will. 4, c. 27, sect. 28. This section is now repealed; see 37 & 38 Vict. c. 57, sect. 9; and sect. 7 of that act is substituted. As to the acknowledgment in writing, see *Lucas v. Dennison*, 13 Sim. 584; *Hansard v. Hardy*, 18 Ves. 455; *Stansfield v. Hobson*, 22 L. J. Ch. 657.

(k) *Richardson v. Younge*, L. R. 10 Eq. 275; *ib.* 6 Ch. 478; 39 L. J. Ch. 475; 40 *ib.* 338.

(l) *Baker v. Wetton*, 14 Sim. 426; *Barron v. Martin*, 19 Ves. 327.

(m) *Raffety v. King*, 1 Keen, 601; *In re Alison*, 11 Ch. D. 284.

(n) *In re Alison*, *supra*; *Sanders v. Sanders*, 19 Ch. D. 373.

(o) *Wynne v. Styant*, 2 Ph. 303; *Pears v. Laing*, L. R. 12 Eq. 41; 40 L. J. Ch. 225.

(p) *Faulkner v. Bolton*, 7 Sim. 319; *Novosielski v. Wakefield*, 17 Ves. 417.

(q) *Lambert v. Rogers*, 2 Mer. 489; *Addison v. Walker*, 4 You. & C. 447.

(r) *Browne v. Lockhart*, 10 Sim. 421.

Of the Accounts to be taken. — In taking an account of the amount of the mortgage-debt, interest, and costs, the amount of the rents and profits received by the mortgagee, deducting expenses, will be set off against the interest and costs. (s) The mortgagee is not obliged to account according to the actual value of the land, nor is he bound by any proof that the land is worth so much, unless it can be shown that he might have made so much of it but for his own wilful default. (t) The general rule is, that he is only accountable for what he receives, and is not bound to take any particular trouble to make the most of another man's property. He is, however, accountable not merely for his own actual receipts whilst in possession, but also for the receipts of those to whom he may have transferred possession under an arrangement inoperative to transfer title, and in derogation of the rights of the mortgagor. (u) Where a mortgagee has entered upon default of payment he may, on accounts being taken, charge the higher rate of interest fixed by the deed, and not the lower one chargeable upon punctual payment. (x) The court will not direct the master to fix, and charge the mortgagee with, an occupation rent, unless the plaintiff alleges and shows, not only that the mortgagee has been in possession of the mortgaged estate, and in receipt of the rents and profits thereof, but also that he has resided on and been in the occupation of the property, or of part of it. (y) The mortgagee may have interest upon interest if confirmed by the mortgagor. (z) He will be allowed, also, the necessary expenses attending the collection of the rents, and the costs of a receiver where a receiver is necessary; (a) but [* 606] he cannot *charge for his personal trouble, although there may be an express agreement that he shall be

(s) Though until an account be taken, the mortgagee in possession is not bound to appropriate rents received to interest. *Cockburn v. Edwards*, 18 Ch. D. 449.

(t) *Parkinson v. Hanbury*, L. R. 2 H. L. 1; *National Bank of Australasia v. United Hand-in-Hand Co.*, 4 Ap. Cas. 392.

(u) *National Bank of Australasia v. United Hand-in-Hand Co.*, 4 Ap. Cas. 392.

(x) *Union Bank of London v. Ingram*, 16 Ch. D. 53.

(y) *Trulock v. Robey*, 15 Sim. 265.

(z) *Blackburn v. Warwick*, 2 Y. & C. 92.

(a) *Davis v. Denby*, 3 Mad. 170; *Langstaffe v. Fenwick*, 10 Ves. 405; *Union Bank of London v. Ingram*, 16 Ch. D. 53; see also the 44 & 45 Vict. c. 41, sect. 24.

entitled to do so. (b) In the case of a mortgage of a mine or quarry, the mortgagee will be entitled to all fair and reasonable expenses incurred in working the mine and rendering it productive; but he must not indulge in rash speculations. (c) And he has no right to charge upon the mortgagor the costs and expenses of unnecessary improvements, and is not permitted to increase the value of the estate in such a way as to make it impossible for the mortgagor, with his limited means, ever to redeem. This is what has been termed improving a mortgagor out of his estate. (d) But he will be entitled to charge all fair, customary, and necessary expenses in renewing leases, and in necessary repairs and moderate improvements. (e) So the mortgagees of a ship were held entitled to "just allowances" in taking and holding possession of the ship, advertising it for sale, and effecting insurances. (f) So they are entitled to necessary repairs under the head of "just allowances," but not to permanent improvements or substantial repairs. (g) If, in taking the accounts, the mortgagor proves the estate to have been let at a certain rent at any time during the mortgagee's possession, the *onus* will be thrown on the mortgagee to show that such was not the rent during the whole period of his possession. (h) If no interest is in arrear when the mortgagee takes possession, or the rents considerably exceed the interest, annual rests of rents received will be ordered to be taken; (i) but the court does not in general direct annual rests, if there were arrears of interest at the time the mortgagee possessed himself of the mortgaged premises; and if a mortgagee is not liable to account with annual rests when he enters into possession, he does not become so liable until the whole of the mortgage-debt has been paid off. But where a mortgagee in possession came to an account with the mortgagor whereby all the arrears of interest, &c., were converted into principal, leaving thereby no arrears, and he continued in possession, the rent being more than sufficient to keep down

(b) *French v. Baron*, 2 Atk. 120.(c) *Rowe v. Wood*, 2 Jac. & Walk. 533.(d) *Sandon v. Hooper*, 6 Beav. 246.(e) *Scholefield v. Lockwood*, 33 L. J. Ch. 106.(f) *Wilkes v. Saunton*, 7 Ch. D. 188.(g) *Tipton Green Co. v. Tipton Moat Co.*, 7 Ch. D. 192.(h) *Blacklock v. Barnes*, Sel. C. C. 53.(i) *Shephard v. Elliott*, 4 Mad. 254; *Gould v. Tancred*, 2 Atk. 533.

the interest, the court decreed annual rests. (*k*) In taking the account, the mortgagor is entitled to the benefit of set-off. (*l*) If the mortgagor has given notice of his intention to pay off the mortgage by a given day, and the payment of the money and the redemption of the estate are postponed by reason of [* 607] the mortgagee's having lost some of the *title-deeds, the mortgagor will not be bound to pay interest after the day on which he was ready to pay off the principal. The mortgagee, moreover, must indemnify the mortgagor against the consequences of the loss of the deeds. (*m*) The party seeking to redeem has, in general, to pay the costs of the suit; but when the mortgage-debt, interest, and costs have been tendered prior to the filing of the bill, and the mortgagee has put forward unjust and unfounded claims, and has refused to re-convey, except on payment of money which he had no right to demand, the court has thrown the burthen of the costs upon him. (*n*)

Registration of Mortgages.¹ — Mortgages of lands in the coun-

¹ Upon the system of registration of mortgages which prevails throughout the United States, a very extensive and important branch of the subject, see Jones, *Mortg. c. 12*, Registration as affecting priority; Thomas, *Mortg. c. 12*, The Recording acts; U. S. Dig. tit. *Mortgages*; also, *ib. tit. Deeds*. The best account is in 2 Pom. Eq. Jur. sects. 646-658.

For the course of procedure in foreclosure suits, see Jones, *Mortg. c. 25-40*; Thomas, *Mortg. c. 20-33*; Daniel, *Ch. Pr.* (5th Am. ed., 1880; 6th Lond. ed., 1882); Pom. Eq. Jur.; U. S. Dig. tit. *Mortgages*.

A mortgage must be presumed to be executed at its date until the contrary is shown (*Merrill v. Dawson*, Hempst. 563; *Fowler v. Merrill*, 11 How. 375); and where it purports to have been signed and sealed, and actually has a scroll attached as a seal, to prove the omission devolves upon those who assert that it was executed without a seal (*Gronning v. Behn*, 10 B. Mon. 383). Proof of the execution and registry of a mortgage-deed is *prima facie* evidence of title in the mortgagee, without the production of the note on which it is founded (*Davis v. Mills*, 18 Pick. 394); so also the making of a mortgage of personal property, by request of the mortgagee, and a delivery of it by the mortgagor to the town clerk for registry, are evidence from which a jury may infer a delivery of the mortgage, although the original is lost or destroyed (*Thayer v. Perkins*, 6 Cush. 11); and proof of the execution, delivery, acknowledgment, and recording of a mortgage from a third person to the demandant is sufficient, *prima facie*, to sustain a writ of entry to recover the land

(*k*) *Wilson v. Cluer*, 3 Beav. 136; (*n*) *Morley v. Bridges*, 3 Col. C. C. 621; *Finch v. Brown*, *ib.* 70; *Montgomery v. Calland*, 14 Sim.

(*l*) *Agra and Masterman's Bank, Ex parte Anderson*, 36 L. J. Ch. 73; 79; *Roberts v. Williams*, 4 Hare, 129; see also *National Bank of Australasia v.*

(*m*) *Midleton v. Eliot*, 11 Jur. 742, *United Hand-in-Hand Co.*, 4 Ap. Cas. V. C. E. 891.

ties of Middlesex and Yorkshire, and equitable charges thereon, must be registered. (o) A memorandum of further charge in

mortgaged, without proof of title in such third persons (*Burridge v. Fogg*, 8 Cush. 183). The fact that a mortgage for purchase-money, given at the time the conveyance was made, was executed with all proper formality, raises the presumption that the deed (which in this case had been lost unrecorded) was likewise properly executed. *Godfrey v. Disbrow*, Walk. 260. Where, in a suit on a mortgage, defendant answered, acknowledging execution of a similar mortgage, but denied that it included a certain lot set forth by the plaintiff, and claimed said lot as a homestead, it was held that the burden of proof in the case was upon the defendant. *Van Horn v. Bell*, 11 Iowa, 465. If neither the pleadings nor the mortgage given by husband and wife show in whom the title to the premises is, the presumption, in the absence of proof, is that the title is in both the mortgagors. But it is competent, to save or determine the rights of either party, to show by proof who holds the title in fact, whether the husband, the wife, or both. *Ayres v. Probasco*, 14 Kan. 175.

The party setting up that the consideration of a mortgage arose out of an illegal contract has the burden of proof (*Feldman v. Gamble*, 26 N. J. Eq. 494); and if it appears that the consideration of a mortgage is a sale of spirituous liquors, the burden is on him who seeks to avoid the contract to show that the sale was illegal (*Trott v. Irish*, 1 Allen, 481); but it is not upon the defendant to show that he paid the consideration for the assignment of a mortgage, or that a third person paid it, where, in a writ of entry by the assignee, the execution and assignment of the mortgage and note are proved (*Parker v. Floyd*, 12 Cush. 230). The burden of proving a deed absolute intended as a mortgage is on the grantor. *Haines v. Thompson*, 70 Pa. St. 434; *Cotton v. McKee*, 68 Me. 486; and see *Hancock v. Harper*, 86 Ill. 445.

A mortgage being a mere incident of the debt secured by it, the debt must first be proved before an action on the mortgage can be maintained (*Bennett v. Taylor*, 5 Cal. 502); and the rights conferred by a mortgage cease when the debt it is given to secure is barred (*Ross v. Mitchell*, 28 Tex. 150). The possession by the mortgagor of the notes secured by the mortgage is *prima facie* evidence that they have been paid by him (*Smith v. Smith*, 15 N. H. 55; *Richardson v. Cambridge*, 2 Allen, 118; *Johnson v. Nations*, 26 Miss. 147; *Chapman v. Hunt*, 18 N. J. Eq. 414; see also *Succession of Norton*, 18 La. Ann. 36; *Grimes v. Kimball*, 3 Allen, 518); and a payment made by a mortgagor to the mortgagee after the execution of the mortgage, is presumed to be on account of the mortgage debt. If the mortgagee, in a contest between him and other creditors of the mortgagor, asserts that it was made on account of another debt, he is bound to prove it (*Tharp v. Feltz*, 6 B. Mon. 6); and where a mortgagor had procured the note of a third person to be made payable to the mortgagee, and there was no evidence of any other indebtedness on his part, and the mortgagee afterward became administrator of the mortgagor, the possession of the note by the latter was held no presumption that it had not been paid (*ib.*). Nor is there any legal presumption that negotiable notes given and accepted for the amount of a mortgage, by the mortgagor to the mortgagee, were given and accepted in satisfaction of the mortgage; the question whether they were so given is for the jury (*Brown v. Scott*, 51 Pa. St. 357). Where a mortgage of personal property is given to secure the payment of a note therein

(o) *Moore v. Culverhouse*, 27 Beav. *Wight's Mortgage Trust*, L. R. 16 Eq. 639; 29 L. J. Ch. 419; *Neve v. Pennell*, 41. 2 H. & M. 170; 33 L. J. Ch. 19; *In re*

favor of the first mortgagee requires registration as much as the original mortgage, and in the absence of registration will be postponed to a second registered mortgage without notice of such

described, but that offered in evidence to support the mortgage is materially different, it must be clearly shown that the last note was intended by the parties as a renewal of the former (*Barrows v. Turner*, 50 Me. 127); and in a suit between an attaching creditor and a claimant to try the title to the property attached, the plaintiff may offer evidence showing that after the date of the supposed mortgage to the claimant the defendant sold to the plaintiff a part of the goods mortgaged, in the absence of the claimant (*Mayer v. Clark*, 40 Ala. 259).

Lapse of time does not authorize the presumption that a mortgage debt has been paid, where the possession of land mortgaged to secure a debt has been constantly in the mortgagee (*Crooker v. Jewell*, 31 Me. 306), or where a mortgagor has retained possession of the mortgaged premises for more than twenty years after the execution of the mortgage, but has acknowledged the debt and paid interest upon it within twenty years (*Howard v. Hildreth*, 18 N. H. 105; *s. p. Wright v. Eaves*, 10 Rich. Eq. 582); but where a mortgage debt had lain dormant from April, 1774, to March, 1802, the lapse of time was held sufficient to authorize the presumption of payment (*Jackson v. Pierce*, 10 Johns. 414; so also where twenty-three years had elapsed since the last payment, *Kellogg v. Wood*, 7 Paige, 578). Where a mortgagee has never entered under the mortgage, and there has been no payment of interest, nor demand thereof, nor any admission of the mortgage as a subsisting lien, within twenty years, the mortgage will be presumed to have been satisfied (see cases cited, 9 U. S. Dig. 329, sect. 3716); or within ten years (*Roberts v. Welch*, 8 Ired. Eq. 287; *Brown v. Becknall*, 5 Jones Eq. 423); and the presumption becomes absolute after fifteen years, if there is no entry, or payment of interest (*Whitney v. French*, 25 Vt. 663); but if interest is paid within ten years before the filing of a bill to foreclose, this will repel the presumption of payment or abandonment arising from length of time (*Hughes v. Blackwell*, 6 Jones Eq. 73); it will also be repelled (as in New York) where a statute foreclosure of a mortgage occurred thirty-one years after the moneys secured fell due (*Jackson v. Slater*, 5 Wend. 295). So in regard to title, a mortgage given to secure land sold and conveyed will be presumed extinguished after a lapse of from thirty to fifty-six years, and the enjoyment of the land under the title conveyed (*Murray v. Fishback*, 5 B. Mon. 403; *Inches v. Leonard*, 12 Mass. 379); but no presumption can arise that the mortgage has been satisfied in favor of a person with fifty years' exclusive possession, who did not derive his title under the mortgage (*Owings v. Norwood*, 2 Har. & J. 96). Mere lapse of time raises no presumption in favor of a stranger against the title of a mortgagee (*Appleton v. Edson*, 8 Vt. 241); and the admissions of a mortgagor that the mortgage-debt is due, are evidence against a terre-tenant to rebut the presumption of payment from lapse of time, where it does not appear that the terre-tenant had an interest before the admissions were made (*Frear v. Drinker*, 8 Pa. St. 520). It will be presumed that a mortgage has been satisfied, or become barred by lapse of time, where the mortgagor and his assigns have held and enjoyed the mortgaged estate for more than seventy years, and no claim under the mortgage has been set up. (*Atkinson v. Patterson*, 46 Vt. 750. A court of equity will not decree the satisfaction of a mortgage, unless it is proved to have been paid: lapse of time is not sufficient ground for interference (*Coates v. Roberts*, 2 Phila. 244); nor is the retention of mortgaged property after the law day has passed *prima facie* evidence of fraud, nor does it authorize a legal presumption of payment (*Steele v. Adams*, 21 Ala. 534; but see *Clark v. Johnson*, 5 Day, 373).

further charge. (*p*) By the Land Transfer Act, 1875, (*q*) provisions are made for the registration of mortgages on land registered under that act, and for the transfer (*r*) and transmission on death, bankruptcy, or marriage (*s*), and by the Conveyancing and Law of Property Act as to the devolution of trust and mortgage estates upon death. (*t*)

Re-conveyance of the Estate. — If the mortgage-money is not paid at the time appointed, the legal estate granted is, as we have before seen, discharged of the condition, and becomes absolutely vested in the mortgagee. If at a subsequent period the mortgagee receives the mortgage-money pursuant to any previous parol agreement to enlarge the time of payment, or of his own free will, the legal estate is not re-vested in the mortgagor, but remains the property of the mortgagee until it has been re-conveyed by deed. But whenever the mortgage-money and interest have been paid back and received by the mortgagee, or the mortgagor has tendered, or is ready and offers to pay, it with costs, the court will compel the mortgagee to receive it and execute a re-conveyance of the estate, so long as the mortgagor's right to redeem has not been foreclosed, or extinguished by effluxion of time. (*u*) When a * particular time is [* 608] fixed for the repayment of the money advanced and the re-transfer of the property to the mortgagor, the mortgagee cannot be compelled to receive the money and relinquish the property, or to re-convey it, before the appointed period. (*x*) After the mortgagor has made default in payment of the mortgage-debt at the time appointed, he must give six calendar months' notice to the mortgagee of his intention to pay off the mortgage.

By the Conveyancing and Law of Property Act, 1881, the mortgagor may require the mortgagee, instead of re-conveying, to assign the mortgage-debt and convey the property to a third

(*p*) *Credland v. Potter*, L. R. 18 Eq. 350, 10 Ch. 8.

(*q*) 38 & 39 Vict. c. 87, sects. 22-28.

(*r*) Sect. 40.

(*s*) Sects. 41-47, sect. 87.

(*t*) 44 & 45 Vict. c. 41, sect. 30, repealing sect. 48 of Land Transfer Act.

(*u*) *Walker v. Jones*, L. R. 1 P. C. 50; 85 L. J. C. P. 30; *Oxford and Canterbury Hall Co., In re*, L. R. 5 Ch. 433; 39 L. J. Ch. 775.

(*x*) *Brown v. Cole*, 14 L. J. Ch. 167.

person, but this does not apply to a mortgagee in possession, or who has been in possession. (y)

Foreclosure and Sale.—The mortgagee, on non-payment of the mortgage-debt at the time appointed, may claim a foreclosure of the equity of redemption, and the court, without allowing any time for redemption, may, if it thinks fit, direct a sale on such terms as it thinks fit at any time before foreclosure absolute. (z) Until the mortgagee is actually paid off by his own consent, or by decree of the court, he retains the character of mortgagee, with all the rights incident thereto, and it was held that he might therefore claim a foreclosure, notwithstanding a notice by the mortgagor to pay off the mortgage, and even notwithstanding a decree for redemption. (a)

Before a decree for foreclosure can be obtained, all parties entitled to the mortgage-money must be brought before the court and be made parties to the proceedings. (b) When a mortgage is paid off, the mortgagee becomes a trustee of the title-deeds for the mortgagor, and is answerable to the latter for the loss of the deeds. (c) A decree for foreclosing the right of redemption of an infant must give the infant a day to show cause against the decree after he attains twenty-one. (d) Although it has been said that a foreclosure only seeks the exclusion of an equity, yet it is in substance a suit for the recovery of money. The statute of limitations, therefore, may be pleaded to a claim of foreclosure. (e) If, after a claim for foreclosure has been [* 609] brought by a mortgagee in *possession praying a sale, it is found that the rents and profits received by him were sufficient to satisfy the mortgage-debt, and that nothing

(y) 44 & 45 Vict. c. 41, sect. 15. See Coote, on Mort. (4th ed.) 655, 741. The section applies to mortgages before and after the act, and notwithstanding any stipulation to the contrary. The consent of the *puius* mortgagee must be obtained; see Teevan v. Smith, 20 Ch. D. 724.

(z) 44 & 45 Vict. c. 41, sect. 15; Union Bank of London v. Ingram, 20 Ch. D. 463; Jenkin v. Row, 5 De G. & S. 107; 7 Geo. II. c. 20; Lushington v. Price, 9 Sim. 651.

(a) Grugeon v. Gerrard, 4 Y. & C. 119.

(b) Palmer v. Carlisle, Earl of, 1 Sim. & Stu. 423.

(c) Brown v. Sewell, 22 L. J. Ch. 1063; Hornby v. Matcham, 16 Sim. 327.

(d) Price v. Carver, 3 Mylne & C. 157.

(e) Dearman v. Wyche, 9 Sim. 570. But see Lord St. Leonards' Practical Treatise on the New Statutes relating to Property, 2d ed. p. 189, sect. 51.

was due to the mortgagee at the commencement of the action, he will be ordered to pay all the costs, including those of the reference and the taking of the accounts; (*f*) and if the mortgagee, after the commencement of his action, assigns over his mortgage, he will have to pay all the costs thereby rendered necessary to bring his assignee before the court. (*g*) The court might direct a sale instead of a foreclosure under the 15 & 16 Vict. c. 86, sect. 48, without the consent of the mortgagor. (*h*) See now Conveyancing and Law of Property Act, sects. 19–25.

Enlargement of the Time for Payment. — The time appointed by the decree for payment of the mortgage-debt will be enlarged by the court, even after the decree has been made, and the mortgagee has been in possession for many years under it, if any fair and reasonable ground can be shown for the proceeding; and unfair conduct in obtaining the decree will itself open the decree. (*i*) When the time for payment is enlarged, all subsequent interest will be computed on the aggregate sum found due for principal, interest, and costs. (*k*) If the mortgagee has received rents between the date of the master's report and the day appointed for the payment, the court will refer the report back to the master to continue the accounts and appoint a new day for payment. (*l*) When the mortgagor has brought his action to redeem, and a day has been appointed for payment, the court will not in general enlarge the time. (*m*)

Of the Different Remedies of the Mortgagee. — Where a debt is secured by mortgage, covenant, and bond, the mortgagee may pursue all his remedies at the same time. If he obtains full payment on the bond or covenant, the mortgagor becomes entitled to the estate; but if he obtains part payment only, he may go on with a claim for foreclosure, and foreclose for the remainder. On the other hand, if he forecloses in the first instance, and the value of the estate proves insufficient to satisfy the debt,

(*f*) *Binnington v. Harwood*, 1 Turn. & Russ. 477. (*i*) *Eyre v. Hanson*, 2 Beav. 478; *Jones v. Creswicke*, 9 Sim. 304; *Cocker v. Bevis*, 1 Ch. C. 61.

(*g*) *Barry v. Wrey*, 3 Russ. 465. As to foreclosure of separate mortgages and (*k*) *Bruere v. Wharton*, 7 Sim. 483.

foreclosure by claim, see *Smeathman v. Ellis v. Griffiths*, 7 Beav. 83.

Bray, 15 Jur. 1051. (*m*) *Novosielski v. Wakefield*, 17 Ves.

(*h*) *Newman v. Selfe*, 33 Beav. 522; 417. 33 L. J. Ch. 527.

he may, while the mortgaged estate remains in his power, sue on the bond or covenant; but in so doing he opens the foreclosure, and the mortgagor thereupon becomes entitled to redeem. If, after foreclosure, he sells the estate, and realizes less than what is due to him, he cannot bring an action after such sale, and after

he has disabled himself from restoring the estate, to [* 610] recover from the mortgagor, * upon the collateral personal securities, the difference between the price realized on the sale and the original mortgage debt. (n) Nor can he sue on collateral securities, unless he is in a condition to reconvey the estate. (o) In an action for redemption alone, or for sale alone, judgment may be obtained now for redemption or sale. (oo)

Powers of Sale.¹ (p) — A mortgagee, having an absolute power of sale on failure of payment of the mortgage-debt and interest,

¹ Upon an express power of sale in a mortgage, how it may be conferred, how the grant should be construed, and its validity and effect, how the power may be executed, &c., see Jones, *Mortg.* c. 39, 40; Thomas, *Mortg.* U. S. Dig. tit. *Mortgages*, X.

Recent decisions are: *Burr v. Robinson*, 25 Ark. 277; *Berry v. Skinner*, 30 Md. 567; *Hamilton v. Lubukee*, 51 Ill. 415; *Griffin v. Marine Co.*, 52 Ill. 130; *Elliott v. Wood*, 45 N. Y. 71; *Strother v. Law*, 54 Ill. 413; *Hyde v. Warren*, 46 Miss. 13; *Blount v. Carroway*, 67 N. C. 396; *Thompson v. Houze*, 48 Miss. 445; *Sandford v. Flint*, 24 Mich. 26; *Parmenter v. Walker*, 9 R. I. 225; *Encking v. Simmons*, 28 Wis. 272; *Smithers v. Heather*, 25 Mich. 447; *Heath v. Hall*, 60 Ill. 344; *Princeton Loan & T. Co. v. Munson*, ib. 371; *Powell v. Hopkins*, 38 Md. 1; *Walker v. Cockey*, ib. 75; *Horsev. v. Hough*, ib. 130; *Lockett v. Hill*, 1 Woods, 552; *Smith v. Myers*, 41 Md. 425; *Burns v. Thayer*, 115 Mass. 89; *Brown v. Smith*, 116 Mass. 108; *Dexter v. Shepard*, 117 Mass. 480; *Gaines v. Allen*, 58 Mo. 537; *Markey v. Langley*, 92 U. S. 142; *Lewis v. Wells*, 50 Ala. 198; *Calloway v. People's Bank*, 54 Ga. 441; *Hull v. Bliss*, 118 Mass. 554; *Evans v. Lee*, 11 Nev. 194; *Kornegay v. Spicer*, 76 N. C. 95; *Mosby v. Hodge*, ib. 387; *Brown v. Delaney*, 22 Minn. 349; *Mann v. Burges*, 70 Ill. 604; *Waller v. Arnold*, 71 Ill. 350; *Whitehead v. Helen*, 76 N. C. 99; *Landrum v. Union Bank*, 63 Mo. 48; *McGuire v. Van Pelt*, 55 Ala. 344; *Cowles v. Marble*, 37 Mich. 158; *McAllister v. Plant*, 54 Miss. 106; *McLane v. Paschal*, 47 Tex. 365; *Alden v. Goldie*, 82 Ill. 581; *Joyner v. Farmer*, 78 N. C. 196; *Bay City Bank v. Chapelle*, 40 Mich. 447; *Shillaber v. Robinson*, 97 U. S. 68; *Blackwell v. Barnett*, 52 Tex. 326; *Merrin v. Lewis*, 90 Ill. 505; *Parsons v. Rhodes*, 22 Hun, 80; *Webb v. Haeffer*, 53 Md. 187; *Queen City, &c. Build. Assoc. v. Price*, 53 Md. 397; *Cassidy v. Cook*, 99 Ill. 385; *Warren v. James*, 130 Mass. 540.

(n) *Lockhart v. Hardy*, 9 Beav. 349; 35 L. J. P. C. 30; *Burrell v. Smith*, *Burnell v. Martin*, 2 Doug. 417. L. R. 7 Eq. 399; 38 L. J. Ch. 382.

(o) *Walker v. Jones*, L. R. 1 P. C. 50. (p) See the 44 & 45 Vict. c. 41, sects.

(oo) See 44 & 45 Vict. c. 41, sect. 25; 19-22.

must act *bona fide* in the conduct of a sale; but the court will not interfere merely because the sale is disadvantageous. (q) A power given to a trustee in a mortgage-deed, to sell on the request of the mortgagor, does not necessarily convey to the trustee a right to enter upon the mortgaged premises. (r) Where there are several mortgages of several estates to the same mortgagee for distinct debts, the proceeds of the sale of each estate must be applied solely in liquidation of the particular debt charged thereon, so that the surplus from one estate cannot be applied to make good the deficiency of another estate. (s) There is nothing to prevent a puisne mortgagee from purchasing the mortgaged property upon the exercise by a prior mortgagee of his power of sale; and if he does so purchase, he will acquire an absolute, irredeemable title as against the mortgagor. (t) First and second mortgagees may join in selling, and each may give a separate receipt for his portion of the purchase-money to the purchaser. (u)

Insurance against Fire by the Mortgagee. — By the Conveyancing and Law of Property Act, 1881, power to insure is given to the mortgagee (x), provision is made for limiting the amount of insurance money to that named in the deed, or if not named then two thirds of the total loss, (y) and for application of the money at the mortgagee's request by the mortgagor in making good the loss, (z) or without prejudice to any agreement to the contrary in discharging the money due under the mortgage. (a)

Of the Tacking of Arrears of Interest and Incumbrances. — Upon the principle that he who seeks equity shall do equity, the court will not enable a mortgagor to redeem his estate, except upon the terms that he pays all arrears of interest for payment of which he is personally liable, whether the arrears do or do not * constitute a charge upon the mortgaged [* 611]

(q) *Jones v. Matthie*, 11 Jur. 504; *Kirkwood v. Thompson*, 2 De G. J. & S. 613; *Marriott v. Anchor Reversionary Co.*, 30 L. J. Ch. 122, 571; *Warner v. Jacob*, 20 Ch. B. 220.

(r) *Watson v. Waltham*, 2 Ad. & E. 485.

(s) *Ex parte Bignold*, 2 Deac. 66.

(t) *Shaw v. Burney*, 34 L. J. Ch. 257; 33 Beav. 494.

(u) *M'Carogher v. Whieldon*, 34 Beav. 107.

(x) 44 & 45 Vict. c. 41, sect. 19 (i), (ii).

(y) Sect. 23 (1); where there is no insurance required, or the mortgagor insures, the act does not apply.

(z) Sect. 23 (3).

(a) Sect. 23 (4).

premises, (b) and also all the costs and expenses necessarily incurred by the mortgagee in maintaining the title to the estate, and in repairing and preserving the mortgaged property, and all debts due to him from the mortgagor in respect of which he has a lien upon the land sought to be redeemed. (c) If, therefore, the mortgagee has advanced money to the mortgagor beyond the amount secured by the mortgage, expressly by way of further charge on the mortgaged premises, or on a judgment, statute, or recognizance, these subsequent advances must be repaid before the court will order the mortgagee to re-convey the estate. But if there is no lien on the land in respect of such subsequent advances, a re-conveyance will be ordered independently of them. (d) A bond or simple contract debt cannot be tacked on to a mortgage as against the mortgagor himself; but it may as against the heir or beneficial devisee, or the executor of a mortgagor for a term of years, coming to redeem, (e) unless there be a devise for payment of debts, in which case the mortgagee must come in upon the bond ratably with the other creditors. (f) No bond or simple contract debt can be tacked on to the mortgage as against mesne incumbrancers having a lien upon the land, (g) nor as against the assignee or mortgagee of the equity of redemption, or creditors, or purchasers for a valuable consideration. (h) As he who seeks equity must do equity, the court will not, where two estates have been severally mortgaged between the same parties to secure the repayment of several debts, and the title to one estate proves defective, enable the mortgagor or his assignee (i) to redeem one mortgage without paying off both. (k) But where one of the mortgaged properties has ceased to exist (as

(b) *Elvy v. Norwood*, 21 L. J. Ch. 716; 5 De G. & S. 240.

(c) *South v. Bloxam*, 2 H. & M. 457; 34 L. J. Ch. 369.

(d) *Baker v. Harris*, 16 Ves. 397. As to discharge of liens, see 44 & 45 Vict. c. 41, sect. 17.

(e) *Challis v. Casborn*, Pre. Ch. 407; *Morret v. Paske*, 2 Atk. 53; *Archer v. Snatt*, 2 Str. 1107; *Coleman v. Winch*, 1 P. Wms. 775.

(f) *Heams v. Bance*, 3 Atk. 630; *Price v. Fastnedge*, Amb. 685.

(g) *Lowthian v. Hasel*, 3 Bro. C. C. 162.

(h) *Anon.*, 2 Ves. Sen. 662; *Adams v. Claxton*, 6 Ves. 225.

(i) *Beevor v. Luck*, L. R. 4 Eq. 537; 36 L. J. Ch. 865. But see *Cummings v. Fletcher*, *infra*, and *Harter v. Colman*, 19 Ch. 630.

(k) *Jones v. Smith*, 2 Ves. Jun. 376; *Roe v. Soley*, 2 W. Bl. 725. See *post*, p. * 613, Tacking and Consolidation.

ere a lease has been forfeited by bankruptcy) the two debts not be consolidated so as to prevent one property being separately redeemed. (*l*) The right of a mortgagee to unite two securities from the same mortgagor exists equally in foreclosure and redemption suits. (*m*) Consolidation only applies where there has been default on all the securities *sought to [* 612] consolidated. (*n*) A mortgage for an individual debt not be consolidated with one for a partnership debt. (*o*)

Priority of Incumbrances and Mortgages.—If the mortgagee elects to ask for the title-deeds of the mortgaged property, and secure the possession of them, he will take his mortgage subject to any lien which the holder of the deeds may be able to establish on the estate. (*p*) If a party, having knowledge of a deposit of title-deeds, avoids making any inquiry into the circumstances under which the deposit was made, and does not require the deeds to be delivered up to him, his claim as mortgagee will be postponed to that of the depositary of the deeds. (*q*) Where the creditor of a London publican took from the latter a mortgage as a security for an antecedent debt, knowing at the time that the publican was indebted to his brewers, and that it was the ordinary practice of London publicans to deposit their accounts with their brewers as a security for debts due to them, and made no inquiry upon the subject, and the publican's lease had, in fact, been deposited with the brewers as a security for the balance of their account for beer, it was held that the lien of the brewers had priority over the claim upon the mortgage; (*r*) but a first mortgagee, omitting to ask for or parting with the title-deeds, will not on that account be postponed to a subsequent incumbrancer, with whom the deeds have been deposited, without notice of the prior charge, unless in his conduct there

(*l*) *In re Raggett*, 16 Ch. D. 117.

(*m*) *Selby v. Pomfret*, 1 Johns. & H.

30 L. J. Ch. 770. But see this case

mentioned on in *Cummings v. Fletcher*,

Jennings v. Jordan, 6 Ap. Cas.

(*n*) *Cummings v. Fletcher*, 14 Ch. D.

See *post*, p. * 613, Tacking and

consolidation; and p. * 614, Convey-

ancing and Law of Property Act.

(*o*) *Per James, L. J.*, in *Cummings*

v. Fletcher, supra.

(*p*) *Worthington v. Morgan*, 18 L. J.

Ch. 233; *Perry-Herrick v. Attwood*, 2

De G. & J. 21; 27 L. J. Ch. 121.

(*q*) *Birch v. Ellames*, 2 Anstr. 427.

(*r*) *Whitbread v. Jordan*, 1 You. & C.

303; *Hewitt v. Loosemore*, 9 Hare, 449;

21 L. J. Ch. 69.

(*o*) *Per James, L. J.*, in *Cummings*

v. Fletcher, supra.

(*p*) *Worthington v. Morgan*, 18 L. J.

Ch. 233; *Perry-Herrick v. Attwood*, 2

De G. & J. 21; 27 L. J. Ch. 121.

(*q*) *Birch v. Ellames*, 2 Anstr. 427.

(*r*) *Whitbread v. Jordan*, 1 You. & C.

303; *Hewitt v. Loosemore*, 9 Hare, 449;

21 L. J. Ch. 69.

appears to be such negligence as amounts to fraud. (s) Where, however, the mortgagee of leasehold property lent the lease to the mortgagor, for the purpose of raising money upon it, but at the same time told the mortgagor to inform the person from whom he borrowed the money of the mortgage, and the mortgagor borrowed the money from his bankers upon the security of a deposit of the lease, without giving them notice of the mortgage, it was held that the mortgage must be postponed to the banker's lien. (t) Equitable incumbrances and charges upon the mortgaged property of which the mortgagee had actual or constructive notice at the time he effected the mortgage will have priority over him according to their respective dates; (u)

[* 613] *and when any party, having knowledge of such facts as would lead any person using ordinary caution to make further inquiries, studiously avoids making any inquiry at all, he must be taken to have notice of those facts which, if inquired into, would have been readily ascertained; for such negligence might otherwise be readily made a cloak for fraud. If a party appears to have had even a suspicion of the truth, and then makes no inquiry, his conduct is strong evidence of *mala fides*. (x) Whenever a mortgagee has actual or constructive notice of an existing equitable incumbrance at the time he accepts the mortgage, he will not be permitted to avail himself of an assignment of an outstanding term prior to both, in order to obtain a priority over such equitable incumbrance. (y) As between equitable incumbrancers relief will be given to the incumbrancer prior in point of date, unless he has lost his priority by some act or neglect of his, and that relief will not be refused as against a subsequent incumbrancer on the sole ground of the latter being a purchaser for value without notice. (z)

(s) *Dowle v. Saunders*, 2 H. & M. 242; 34 L. J. Ch. 87; *Hunt v. Elmes*, 2 De G. F. & J. 578; 30 L. J. Ch. 255. *Layard v. Maud*, L. R. 4 Eq. 397; 36 L. J. Ch. 669, must not be taken as an authority to the contrary; see *Thorpe v. Holdsworth*, L. R. 7 Eq. 139.

(t) *Briggs v. Jones*, L. R. 10 Eq. 92.

(u) *Beckett v. Cordley*, 1 Bro. C. C. 353; *Wilmot v. Pike*, 5 Hare, 14; *Wor-*

mald v. Maitland, 35 L. J. Ch. 69. As to this last case, see, however, *Agra Bank v. Berry*, L. R. 7 H. L. 135; and *Spencer v. Clarke*, 9 Ch. D. 137.

(x) *Jones v. Smith*, 1 Hare, 43; *Spencer v. Clarke*, *supra*.

(y) *Willoughby v. Willoughby*, 1 T. R. 763; *Allen v. Knight*, 15 L. J. Ch. 430.

(z) *Thorpe v. Holdsworth*, L. R. 7 Eq. 139.

Tacking and Consolidation.—Where several mortgages have been executed of the same property, they will, as a general rule, have priority according to date; but a third mortgagee buying in the first mortgage may unite his securities and postpone the second mortgagee, provided he had no notice of the second mortgage at the time he lent his money on the third mortgage; and this Hale, C. J., called “a plank gained by the third mortgagee, *tabula in naufragio*.” (a) And this right is not affected by the fact that the second mortgagee is really prior in point of date, and is merely postponed by the operation of the registry acts, nor by the circumstance that the incumbrance, in respect whereof the right to consolidate is claimed, is equitable merely, and that the second mortgagee had no notice thereof. (b) But a prior mortgagee who has an assignment of a third mortgage as a trustee only cannot tack the two mortgages together to the prejudice of intervening incumbrancers; (c) nor are the priorities of successive incumbrancers altered by one of them getting in the legal estate from one who is a trustee for them all, (d) or from a trustee with notice of the trust. (e) A second mortgagee who obtains an assignment of a term to attend the * inheritance, and [* 614] has all the title-deeds, may recover in ejectment against the first mortgagee, if he had no notice of the first mortgage at the time he lent his money; for the first mortgagee, by leaving the title-deeds in the hands of the mortgagor, enabled the latter to commit a fraud. (f) And all mesne incumbrancers who take protection against subsequent incumbrancers have a better equity than the prior incumbrancers who have neglected to take such protection, and are consequently entitled to priority, provided their advances have been made without notice of any prior charge. Therefore a second incumbrancer of an equitable interest who gives notice to the trustees in whom the legal estate is vested, obtains priority over a previous incumbrancer who has

(a) *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Robinson v. Davison*, 1 Bro. C. C. 63; *Belchier v. Butler*, 1 Eden, 323; *Hopkinson v. Rolt*, 9 H. L. C. 514; 34 L. J. Ch. 468; *London & County Banking Co. v. Ratcliffe*, 6 Ap. Cas. 722.

(b) *Neve v. Pennell*, 2 H. & M. 170.

(c) *Morret v. Paske*, 2 Atk. 52.

(d) *Sharples v. Adams*, 32 Beav. 213.

(e) *Saunders v. Dehew*, 2 Vern. 271; *Harpham v. Shacklock*, 19 Ch. D. 207.

(f) *Goodtitle v. Morgan*, 1 T. R. 755.

not given such notice. (g) A first mortgagee for present and future advances is not, as against a second mortgagee, entitled to priority in respect of advances made by him after notice of the second mortgage. (h) Blackacre was mortgaged to A, and then mortgaged to other persons with notice to A. B paid off A by agreement, knowing of the subsequent mortgages. Whiteacre was mortgaged to B by the same owner. A transferred the mortgage of Blackacre to B, the owner joining. It was held that B could not consolidate his mortgage of Whiteacre with the mortgage of Blackacre as against the subsequent mortgagees of Blackacre, and that the doctrine of consolidation could not be so far extended. (i) The grantee of a bill of sale cannot tack a prior mortgage of other property, and so claim the surplus goods after the bill of sale is satisfied, so as to defeat the right of an execution creditor to such surplus. (k) By the Conveyancing and Law of Property Act, 1881, a mortgagor may redeem one mortgage without paying any money due under his separate mortgage on other property, unless a contrary intention is expressed in either mortgage deed. (l)

Every Priority may be lost by Fraud. — If, therefore, a creditor who has a mortgage or lien on the estate of his debtor fraudulently conceals the fact, and thereby enables such debtor to perpetrate a fraud upon a subsequent mortgagee, his claim will be postponed to the claim of the latter under such second mortgage. (m) The want of possession of title-deeds by [* 615] a first mortgagee leads to a *prima facie* presumption of fraud, and will cause such first mortgagee so without the deeds to be postponed to a second mortgagee in possession of the deeds, unless the first mortgagee has been defrauded of the deeds or has been deceived by his own solicitor, and the

(g) *Foster v. Blackstone*, 1 Mylne & K. 297; s. c. *Foster v. Cockerell*, 3 Cl. & Fin. 456; *Timson v. Ramsbottom*, 2 Keen, 35.

(h) *Hopkinson v. Rolt*, 9 H. L. Cas. 514; 34 L. J. Ch. 468; *Menzies v. Lightfoot*, L. R. 11 Eq. 459.

(i) *Baker v. Gray*, 1 Ch. D. 491. See *Mills v. Jennings*, 13 Ch. D. 639; in *H. of L., Jennings v. Jordan*, 6 Ap. Cases, 698.

(k) *Chesworth v. Hunt*, 5 C. P. D. 266.

(l) 44 & 45 Vict. c. 41, sect. 17. The section only applies where one or both of the deeds were made after the commencement of the act.

(m) *Ibbotson v. Rhodes*, 2 Vern, 554; ib. 151, 370; *Berrisford v. Milward*, 2 Atk. 49.

presumption of collusion or of gross negligence in failing to seek for and obtain possession of the deeds can be rebutted. (*n*) But when the court is satisfied of the good faith of the person who has got a prior equitable charge, and is satisfied that there has been a positive statement, honestly believed, that he has got the necessary deeds, he is not bound to examine the deeds, nor is he bound by constructive notice of their actual contents, or of any deficiencies which by examination he might have discovered in them. (*o*)

After a Decree to settle Priorities, there can be no Tacking of subsequent debts and incumbrances to prior securities. (*p*) The second mortgagee is entitled to pay off, and to have a conveyance of the mortgaged estate from, the first mortgagee; and the latter ought, without the compulsion of judicial proceedings, to accept payment from the second mortgagee, and convey the mortgaged estate to him, whether the mortgagor does or does not consent thereto. Where, therefore, a first mortgagee, after receipt of the usual notice by a second mortgagee of the intention of the latter to pay off the mortgage, filed a bill of foreclosure, and the second mortgagee tendered the mortgage-money and costs to the first mortgagee, and the latter declined to accept it, it was held that the first mortgagee was not entitled to the costs of the suit for foreclosure after the tender. (*q*) But it must be clearly shown that the whole amount which the first mortgagee is entitled to charge upon the land is tendered to him. (*r*) After a first mortgage has been paid off, the second mortgagee may file a bill to have the legal estate conveyed to him without praying to foreclose the mortgage; and he may, it seems, do this at the peril of costs until the day of payment under a decree for redemption obtained against him by the mortgagor. (*s*) Upon a question of priority of incumbrances on shares, notice to one or more mem-

(*n*) *Evans v. Bicknell*, 6 Ves. Jun. 183; *Martinez v. Cooper*, 2 Russ. 198; *Hunt v. Elmes*, 2 De G. F. & J. 578; 30 L. J. Ch. 255; *Dowle v. Saunders*, 34 L. J. Ch. 87.

(*o*) *Dixon v. Muckleston*, L. R. 8 Ch. 155.

(*p*) *Ex parte Knott*, 11 Ves. 619.

(*q*) *Smith v. Green*, 1 Col. Ch. C. 555.

(*r*) *Williams v. Owen*, 13 Sim. 597.

This case was not followed in *Forbes v. Jackson*, 19 Ch. D. 615, in so far as it decides that the mortgage cannot be redeemed without paying other sums lent by the mortgagee charged upon the premises.

(*s*) *Grugeon v. Gerrard*, 4 Y. & C. 119.

bers of a joint-stock company individually is not notice to the company at large. (*t*)

Where the Owner of Land deposits his Title-Deeds with a Creditor as a Security for the Payment of a Debt,¹ the creditor has in *equity a claim or charge upon the estate, [* 616] which will bind the land in the hands of all subsequent purchasers who had notice of the deposit at the time they accepted a conveyance of the property, and will prevail over the claims of all prior unexecuted or subsequent judgment creditors, (*u*) and of the trustee of a bankrupt depositor. (*x*) The depositary of the title-deeds has a direct control over the owner's power of disposition of the estate, inasmuch as a purchaser cannot safely take a conveyance without a previous investigation of the title; and if the latter receives notice of the deposit of the deeds before he has completed his purchase, the land will be subjected in his hands to all the claims and charges which the depositary of the deeds may have acquired thereon. (*y*) If, however, a subsequent purchaser or mortgagee has been deceived by false evidence of title, such as the production of forged or counterfeit title-deeds, and has not been guilty of any laches or negligence in the course of his purchase or acquisition of the property, he will be entitled to hold it discharged of the lien. (*z*) In such a case, the equities of the parties being equal, the possessor of the legal title must prevail. So if the depositary of the deeds makes himself in any way a party to the concealment of the deposit from the subsequent purchaser or mortgagee, he will lose his lien upon the land as soon as a transfer or conveyance has been executed to the latter. If he is induced to part

¹ Decisions in some of the States have recognized a deposit of title-deeds as constituting an equitable mortgage; but such practice is not encouraged, and cannot easily be reconciled with the spirit and policy of the registration laws. See U. S. Dig. tit. *Mortgages*, sect. 235; also, *Probasco v. Johnson*, 2 Disney, 96; *Holm v. Wust*, 11 Abb. Pr. n. s. 113; *Meador v. Meador*, 3 Heisk. 562; *First Nat. Bank v. Caldwell*, 4 Dill. 314; *Porter v. Muller*, 53 Cal. 677; *Sidney v. Stevenson*, 11 Phila. 178.

(*t*) *Martin v. Sedgewick*, 9 Beav. 333.

(*u*) *Whitworth v. Gaugain*, 3 Hare, 416; 27 & 28 Vict. c. 112.

(*x*) *Sumpter v. Cooper*, 2 B. & Ad. 223; *Doe v. Jones*, 10 B. & C. 718.

(*y*) *Hiern v. Mill*, 13 Ves. 114; *Birch v. Ellames*, 2 Anstr. 427; *Dryden v. Frost*, 3 My. & Cr. 670.

(*z*) *Plumb v. Fluit*, 2 Anstr. 432.

h the possession of the deeds, and they are then taken with-
his knowledge or authority, and produced as evidence of title
an intended purchaser, who accepts a conveyance and pays
purchase-money in ignorance of the deposit, the land will
s free from the charge. (a) But the depositary will not, from
mere circumstance of his having parted with the possession
he deeds, and without their having been made the instrument
fraud, lose his charge or lien upon the land therein com-
sed. (b) If the property comprised in the title-deeds is sub-
to a trust, the trust will prevail as against the depositary,
ough he had no notice of the trust at the time of the making
he deposit. (c) A lien may be created on the estate and in-
est of the depositor by the deposit of a land certificate granted
conformity with the 25 & 26 Vict. c. 53. (d)

Authentication of the Deposit as a Charge on Realty.— In order
constitute and create a charge or lien of this description upon
land, there must be an actual or constructive deposit of the
e-deeds; (e) an agreement to make a deposit will not
e the *effect of charging the land with the payment [* 617]
he debt. But it is not necessary that there should be
ritten memorandum of the nature and terms of the deposit. (f)
money is advanced on the one side, and the deeds are depos-
d on the other, or the depositor is shown to have been indebted
the depositary at the time of the making of the deposit, it is
icient to constitute and create the charge or lien upon the
d. (g) But the mere production of title-deeds from the pos-
sion of a bond creditor is not of itself sufficient evidence of a
a. (h) A charge upon copyholds may be created by "a mere
osit by a debtor of the copy of court roll with his creditor,"
a security for the payment of the debt. (i) An actual charge
lien by deposit of title-deeds is not within the statute of

(a) *Allen v. Knight*, 5 Hare, 278.

(b) *Ex parte Morgan*, 12 Ves. 6.

(c) *Manningford v. Toleman*, 1 Col.
2. 670.

(d) See sect. 73.

(e) *Ex parte Coombe*, 4 Mad. 249;
Ex parte Perry, 3 M. D. & G. 252; *Daw-
terrell*, 33 Beav. 218.

(f) *Shaw v. Foster*, L. R. 5 H. L. Cas.
321.

(g) *Ex parte Langston*, 17 Ves. 230;
Ex parte Kensington, 2 Ves. & B. 83;
Richards v. Borrett, 3 Esp. 102.

(h) *Chapman v. Chapman*, 20 L. J.
Ch. 465; *Ex parte Hooper*, 19 Ves. 477.

(i) *Whitbread v. Bulnois*, 1 Y. & Col.
303.

frauds; (*k*) but it is otherwise with an agreement to make a deposit, which is not binding unless it is in writing. (*l*) An oral agreement to mortgage lands as a security for the payment of an existing debt, followed by a deposit of title-deeds, has been held to have the effect of hypothecating or charging the lands held under such deeds. (*m*) Title-deeds originally deposited in the hands of bankers for safe custody may, by a subsequent agreement with them, be changed into a deposit to secure the repayment of money advanced; (*n*) and if changes take place in the members of the banking firm, they will not by reason thereof lose the benefit of their security. (*o*) Where some brewers agreed to advance money to a publican on a deposit of his lease, and the lease was delivered by the lessor immediately after its execution to the brewer's agent who advanced the money, it was held that the brewers had a lien on the lease. (*p*) Lastly, it may be observed that, although a written contract is held not to be necessary to establish the charge or lien upon the land, yet, if the depositary can produce no written evidence of the contract, he will not in general be allowed the costs of any proceedings undertaken by him to enforce his lien. (*q*)

Of the Parties entitled to make the Deposit. — The deposit must be made by the person who has the ownership of, and power of disposition over, the property comprised in the deeds, and with the apparent intention of pledging the title as a security [* 618] for the *payment of money. A person who has casually become possessed of title-deeds, or who has received them from a person who had no authority from the owner to pledge them, cannot, of course, found any lien or charge upon the deposit. The depositary, moreover, must have all the deeds which are essential to the establishment of the title. If he has only a portion of the title-deeds, and is possessed only of insufficient and incomplete evidence of title, he cannot found thereon a lien

(*k*) *Russel v. Russel*, 1 Bro. C. C. 269.

(*l*) *Ex parte Coombe*, 4 Madd. 249.

(*m*) *Edge v. Worthington*, 1 Cox, 211; *Ex parte Bruce*, 1 Rose, 374; *Ex parte Harvey*, Mont. & Chitt. 261.

(*n*) *Ex parte Farley*, 5 Jur. 512.

(*o*) *Ex parte Smith*, 2 Mon. D. & De G. 314; *Ex parte Onkes*, ib. 234.

(*p*) *Meux v. Smith*, 2 ib. 789; 1 ib. 396.

(*q*) *Ex parte Brightens*, 1 Swanst. 3; *Ex parte Trew*, 3 Mad. 372; *Ex parte Moss*, 3 De G. & S. 599.

or charge upon the land as against subsequent purchasers and mortgagees; and if part of the title-deeds are deposited with one creditor and part with another creditor, neither of them will obtain a lien by the deposit. (*r*) The depositor of the deeds can, of course, only charge the lands to the extent of his own estate and interest therein. If a tenant for life deposits the title-deeds of the inheritance with his creditor, the estate for life only is charged, and the depositary has no lien against the remainderman; and if a vendor retains the title-deeds, and pledges them, he can confer a security only to the extent of his own lien upon them. (*s*) If the depositor has no interest at all in the deeds, he can confer none on his depositary. (*t*)

Of the Extent of the Lien. — The lien extends in general, in the absence of an express agreement to the contrary, to all the property comprised in the deeds, and embraces the entire estate and interest of the depositor. (*u*) Where the memorandum of the deposit of the conveyance of a house *and furniture* stated, "Herewith I hand you the title-deeds of my Bognor estate as collateral security," it was held that the furniture was excluded, the words "my Bognor estate" having reference only to the house and land. (*x*) But where the lease of a dwelling-house was deposited, it was held that the tenant's fixtures in the dwelling-house were included in the lien, although they were not mentioned in the written memorandum accompanying the deposit. (*y*) If deeds are deposited for the purpose of obtaining credit, the depositary has no lien upon them in respect of moneys previously advanced. (*z*) Where the purchaser of an equity of redemption in premises subject to a mortgage term deposited the purchase deed as a security for a loan, and afterward paid off the mortgage and took a surrender of the term, and became bankrupt, it was held that *the lien created by the [* 619] deposit extended to the whole estate, freed from incum-

(*r*) *Ex parte Wetherell*, 11 Ves. 398; (*u*) *Ashton v. Dalton*, 2 Col. Ch. C. 565.
Ex parte Pearse, 1 Buck, 525. But see

Ex parte Chippendale, 1 Deac. 67; 2 (*x*) *Ex parte Hunt*, 1 Mon. D. & De Mont. & A. 299. G. 139; 4 Jur. 342.

(*s*) *Hooper v. Ramsbottom*, 6 Taunt. 12. (*y*) *Ex parte Cowell*, 12 Jur. 411.

(*t*) *Jackson v. Butler*, 2 Atk. 306; Russ. 274.
Harrington v. Price, 3 B. & Ad. 170. (*z*) *Mountford v. Scott*, 1 Turn. &

brance. (a) If it is stipulated at the time of the making of the deposit that the deeds are to be returned whenever the debt is reduced to a certain amount, there will be no lien or charge upon the land so long as the debt is kept below that amount; but whenever the debt exceeds the sum named, the lien arises and covers the whole amount due. The lien will extend to subsequent advances if that appears by the terms of the original contract, or by subsequent agreement, to have been the understanding and intention of the parties. (b) Where the deposit was accompanied by a written agreement securing a special sum, it was held that the security might be extended to further advances by a subsequent oral contract. (c) Such further liens, founded on further advances, may be created in favor of third parties; but they ought to be evidenced by writing. (d)

Of the Depositary's Right to have the Estate sold. — If the debt or the money, to secure the due payment of which the deposit has been made, is not paid by the time appointed, the depositary may obtain a decree from the court for a sale of the property, and an appropriation of the produce of the sale in satisfaction and discharge of the amount due, six months being allowed the depositor to redeem the property. (e) The court in this respect follows the civil and Continental law, where it is said to be the natural effect of an hypothecation "that, if the debtor does not pay, the creditor may sell, and obtain payment out of the price or marketable value of the thing hypothecated." The debtor may, at any time after the time limited for the payment of the debt has expired, and before the lands have been sold by a decree of the court, release the land, and obtain an extinguishment of the charge by paying or tendering to the depositary the amount of the debt, unless, indeed, the deeds have been deposited under an agreement requiring notice to be given of the debtor's intention to redeem the charge, or imposing cer-

(a) *Ex parte Bisdee*, 1 Mon. D. & De G. 333.

(b) *Ex parte Linden*, 1 Mon. D. & De G. 428; *Ex parte Farley*, ib. 683; *Ex parte Kensington*, 2 Ves. & B. 79; *Ex parte Hooper*, 19 Ves. 477; *Ex parte Alexander*, 1 Glyn & J. 409; *Ex parte Langston*, 17 Ves 227.

(c) *Ex parte Nettleship*, 2 Mon. D. & De G. 124.

(d) *Ex parte Whitbread*, 19 Ves. 209; *Factor v. Philpot*, 12 Pr. 197.

(e) *Pain v. Smith*, 2 Myl. & K. 417; *Lewis v. John*, 1 Coop. Ch. Pr. 10.

tain conditions which have not been complied with. A charge or lien resulting from a deposit of title-deeds is an assignable interest, and may be bought and sold. (*f*)

In the Roman law, if the debt was not paid at the time appointed, the creditor had a right to sell the property without the authority or intervention of any court of justice, provided he duly complied with the following conditions. If the contract of *hypothecation gave him an express au- [* 620] thority to take possession of the hypothecated property, and appropriate it to his use in case of the debtor's default, he might at once seize and sell it. If no such power was given him, he was bound to give notice to the debtor of his intention to sell two years before any sale could take place, and the debtor had, during all that time, the power of redeeming the charge. If he failed so to do, the creditor was, in contemplation of law, the authorized agent of the debtor for the purposes of the sale, and could transfer the right of property and possession of the thing hypothecated to the purchaser by his contract, just the same as any other agent fully authorized by the owner of property to effect a sale thereof on his behalf. Having received the purchase-money, he was at liberty to take therefrom the amount of the charge or debt, and was responsible to the debtor for the surplus. If, on the other hand, the purchase-money was insufficient to discharge such debt, the debtor continued responsible for the deficiency.

Liens on Estates for Unpaid Purchase-Money arise wherever a vendor delivers possession of an estate to a purchaser without receiving payment of the price. (*g*) The lien binds the land in the hands of the purchaser, his heirs and devisees, and all subsequent *bona fide* purchasers with notice. (*h*) But it will not prevail against a *bona fide* purchaser without notice who has obtained a conveyance of the legal estate. The mere deduction of the title to the estate from the first vendor by recital will not be sufficient to affect him with notice; for that does not show that the money was not paid. (*i*) A person who sells an equita-

(*f*) *Hobson v. Mellond*, 2 M. & Rob. 342.

(*g*) *Sugd. Vend. & Purch.* 856, 857, ed. 1846.

(*h*) *Mackreth v. Symmons*, 15 Ves. 329; *Elliott v. Edwards*, 3 B. & P. 181.

(*i*) *Sugd. Vend.* 879.

ble life interest in lands in consideration of the payment of an annuity has a lien upon the land for the annuity as against the purchaser. (*j*) Where lands were sold, and it was agreed that the purchase-money should remain unpaid, and be a charge thereon, and advances were made by the vendor to the purchasers to enable them to build, it was held that the vendor's lien extended to these advances. (*k*) A charge or lien of this description upon a newly purchased estate is termed by the French jurists a tacit hypothecation. (*l*) It does not appear to have been known to the Roman law. The party entitled to the lien may, under certain circumstances, obtain from the court a decree for the re-sale of the property, and an appropriation of the produce of the sale in liquidation and discharge of the debt. (*m*)

[* 621] *The owner of land taken by a railway company is entitled to a lien upon the land so taken for the amount both of the purchase-money and of the compensation for severance, (*n*) and has the same remedies for enforcing it as an ordinary vendor, although the railway company have entered and used the land for the purpose of their railway. (*o*) If land is to be paid for by instalments, every payment is a part performance of the contract by the vendee, and transfers to him a corresponding portion of the estate. (*p*)

Priority of Liens.—As between two persons whose liens are of the same nature and quality and precisely equal, the possession of the deeds gives the priority. But if possession of the deeds has been lost by one incumbrancer and gained by another in consequence of the perpetration of a fraud, possession of the deeds will confer no priority on the holder, although he got them *bona fide* and without any knowledge of the fraud. (*q*) When

(*j*) *Matthews v. Bowler*, 16 L. J. Ch. 239.

(*k*) *Ex parte Linden*, 1 Mon. D. & De G. 428.

(*l*) "Tell est enfin, celle que le vendeur d'un heritage a sur cet heritage, pour le prix qui lui est dû. Les lois romaines ne donnaient point cette hypothèque au vendeur; elle est de notre droit."—PORTIER, *Hypoth.* c. 1, sect. 1.

(*m*) *Rome v. Young*, 3 Y. & C. 199.

(*n*) *Walker v. Ware, &c. Railway Company*, L. R. 1 Eq. 195; 35 L. J. Ch. 94.

(*o*) *Wing v. Tottenham & Hampstead Junction Ry. Co.*, L. R. 3 Ch. 740; *Munns v. Isle of Wight Ry. Co.*, L. R. 5 Ch. 414; 39 L. J. Ch. 522.

(*p*) *Rose v. Watson*, 10 H. L. C. 672. See *Mycroft v. Beatson*, 13 Ch. D. 384.

(*q*) *Ex parte Reid*, 12 Jur. 533.

the equities of the two parties are in all respects precisely equal, the maxim "*qui prior est tempore potior est jure*" will prevail. But when there are several incumbrancers, and one of them, though subsequent in date, has by his greater diligence got in aid of his incumbrance a legal right, the court will give him priority. (r) Whether the lien of a vendor for unpaid purchase-money, or that of a subsequent incumbrancer, ought to be preferred, must depend upon all the circumstances of each particular case, and upon the conduct of the respective parties; and among the circumstances which may give to the one the better equity, the possession of the title-deeds is a very material one. If the unpaid vendor, after executing a conveyance in the usual form acknowledging the receipt of the purchase-money, imprudently delivers to the purchaser the possession of the title-deeds, he arms the latter with the means of dealing with the estate as the absolute owner, and of committing a fraud; and if the purchaser raises money upon the credit of a deposit of the deeds, the equity of the depositary of the deeds will prevail over that of the unpaid vendor. (s) To be safe, therefore, from the claim of a subsequent incumbrancer or mortgagee, the unpaid vendor must keep possession of all the title-deeds, and especially of his own conveyance to the purchaser. (t)

Of Rent-Charges on Lands and Tenements.—The grant of a sum * of money, to issue out of the land of [* 622] the grantor, and to be paid at fixed consecutive periods for a term of years, for life, or in fee, accompanied by a power of distress, creates a charge or lien upon the land, which binds the land in the hands of all subsequent purchasers and mortgagees, and descends with it to the heir-at-law. Wherever a rent-charge can be distrained for, the liability to a distress follows the land into the hands of all persons claiming under or through the grantor of the rent. (u) A general grant of rent to a man without limitation of time will amount to a grant for the life of the grantee, if the grantor himself is seised in fee or his estate lasts

(r) *Bates v. Brothers*, 23 L. J. Ch. 152.

(s) *Rice v. Rice*, 2 Drew. 73; 23 L. J. Ch. 292; *Roberts v. Croft*, 2 De G. & J. 1; 27 L. J. Ch. 220.

(t) *Worthington v. Morgan*, 16 Sim. 547; 18 L. J. Ch. 233.

(u) *Co. Litt.* 162, b; 144, a.

sufficiently long. (x) If a lessee for term of years grants a rent, to be issuing out of the land so held by him, for the life of the grantee, the grant is void as a rent-charge or annuity for life; but it will enure as a grant of a rent for the term and interest possessed by the grantor in the land, provided the grantee shall so long live. (y) All owners of land of full age and under no incapacity may charge their lands with a rent-charge to the full extent of their several interests in the land, but have, of course, no power to charge it to a greater extent. The grant is in all cases good, as against the grantor himself, and those who claim through or under him, although it may be void and of no effect as against persons claiming by title paramount. A rent-charge, being in the nature of an incorporeal right, can only be granted or conveyed by deed or will. The proper mode of creation is by a deed of grant, whereby the grantor grants the rent to be issuing out of certain land, with a power of distress to the grantee for the recovery thereof. No precise form of words is necessary to create the charge, nor need the word "grant" be used in the deed; (z) but there must be equivalent words, manifesting the plain intention of the parties to make a positive and immediate grant. (a)

The Acts for the Registration of Rent-Charges and Annuities (b) do not extend to rent-charges or annuities granted for a fixed term of years or in perpetuity, or to bonds to secure the payment of pre-existing debts by instalments, or to any payments which are not strictly grants of annuities. (c) It has been held that, if a purchaser knows at the time he purchases the land and accepts a conveyance thereof, of the existence of the rent-charge, the land shall remain liable thereto in his hands, although the charge was never registered; "for, where a man purchases with notice of a prior incumbrance, he purchases with an ill conscience, and the statute was never intended to relieve such a person." (d)

(x) Perk. Grants, sect. 104.

(y) St. Auby's case, Cro. Eliz. 183.

(z) Co. Litt. 147, a; 2 Rolle, Abr. 424; Litt. sect. 221.

(a) *In re Locke*, 2 D. & B. 605.

(b) 18 & 19 Vict. c. 15, sects. 12, 13, 14.

(c) *Marriage v. Marriage*, 1 C. B. 776.

(d) *Cheval v. Nichols*, 1 Str. 664; *Greaves v. Tofield*, 14 Ch. D. 563.

*** Of the Power of Distress, Entry, and Sale.** — A grant [* 623] of a rent to a person who had no reversionary estate in the land out of which the rent issued, unaccompanied by a power of distress, did not by the common law charge the land with the rent, and the grantee had no right to distrain for it. It was accordingly called a "rent seck," or dry rent. Now, however, by the 4 Geo. II. c. 28, sect. 5, it is enacted that all persons, bodies politic and corporate, shall have the like remedy by distress in the case of rents seck, rents of assize, and chief rents, as is the case of rent reserved upon lease. If a lessee for years assigns his term, reserving a rent, such rent is not a rent seck within the meaning of the statute, and cannot therefore be distrained for, unless an express power of distress has been reserved or granted in the deed of assignment; but an action must be brought upon the contract for the recovery of the arrears. (e) "There are two ways of creating a rent: the owner of the land either grants a rent out of it, or grants the land and reserves the rent; there is no such a thing as a rent service, rent seck, or rent charge, issuing out of a term of years." (f) In creating a rent, therefore, for life or years, or for years determinable on a life or lives, to be issuing out of a chattel interest, a power of distress is absolutely necessary to charge the land, and enable the grantee and his assignees to distrain, unless the grantee or assignee has the reversion of the lands.

It is said, moreover, that if the grantee was never *seised* of the rent, he cannot distrain for it at all; and as a seisin cannot be had of a chattel interest, but only a possession, an express power of distress ought to be given on creating a rent for years to be issuing out of a freehold estate. (g) In addition to the power of distress, a power is frequently given to the grantee of a rent-charge and to his assignees, to enter upon the lands charged in case of non-payment of the rent within a certain number of days, and hold possession of them, and receive the rents and profits, until he has satisfied the arrears due. In this

(e) Bro. Abr. *Dette*, pl. 32; *Parmenter v. Webber*, 8 Taunt. 593.

(f) *Per Cur.*, — *v. Cooper*, 2 Wils. 375.

(g) Litt. sects. 217, 341; 18 Vin. Abr. 474 C.; *Dixon v. Harrison*, Vaugh. 49;

Gilb. 38.

case the grantee or his assignee has a right of entry if the rent remains unpaid after the time limited, and may maintain an action for the recovery of possession of the land. (*h*) But this right of entry does not extend to copyhold estates. (*i*) When a rent-charge has remained in arrear and unpaid for a considerable period, the court has sometimes, under certain circumstances, ordered the property to be sold and the * purchase-money to be applied in payment of the arrears. (*k*) Provisions for the recovery of rent-charges by distress and other means are contained in the Conveyancing of Law and Property Act, 1881. (*l*)

Extinguishment of Rent-Charges. — “If a man hath a rent-charge to him and to his heires issuing out of certaine land, if he purchase any parcel of this to him and his heires, all the rent-charge is extinct, and the annuitie also, because the rent-charge cannot by such manner be apportioned.” And so, if he brings a writ of annuity and charges the person of the grantor, the land is thenceforth discharged, and the contract becomes a mere personal contract. (*m*)

Lands and Tenements might formerly have been hypothecated by a Registered Judgment. — Thus where a debtor, by a cognovit or warrant of attorney, authorizes his creditor, under certain circumstances or upon a certain contingency, to sign a judgment against him for the amount of the debt, it becomes a judgment debt, and when registered was formerly binding upon all the lands of the debtor, as well after-acquired as those of which he was possessed at the time of the registration of the judgment; (*n*) but the Law of Property Act (23 & 24 Vict. c. 38), sect. 1, enacted that no judgment should affect land, of whatever tenure, as to a purchaser or mortgagee, notwithstanding notice, until a writ of execution had been issued and registered; and the 27 & 28 Vict. c. 112, enacts (sect. 1) that no judgment, statute, or recognizance entered up after the passing of the act shall affect

(*h*) *Haverhill v. Hare*, Cro. Jac. 510; *Ex parte Price*, 3 Mad. 132; *White v. Litt.* sect. 327; *Jemott v. Cowley*, 1 Wms. James, 26 Beav. 191; 28 L. J. Ch. 179. Saund. 112, c; *Doe v. Lord Kensington*, (l) 44 & 45 Vict. c. 41, sect. 44. 8 Q. B. 429. (m) Litt. sect. 222.

(i) *Gilb. Ten.* 181-185.

(n) *Cuthbert v. Dobbin*, 1 C. B. 278;

(k) *Cubit v. Jackson*, M'Clel. 495; 1 & 2 Vict. c. 110.

any land, whatever be the tenure, until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority in pursuance of such judgment, &c. (o) And every writ or other process of execution of any such judgment, &c., by virtue whereof land shall have been delivered in execution, shall be registered in the manner provided by the 23 & 24 Vict. c. 38, but in the name of the debtor against whom such process is issued. Provision is made (sect. 4) for the sale of lands delivered in execution, and for the application of the proceeds of the sale.

Warrants of Attorney, Cognovits, and Orders for Judgment. — Warrants of attorney to confess judgment and *cognovits* must be executed in the presence of and attested by an attorney on behalf of the person giving them; (p) and the documents themselves, or true copies of them, must be filed, as required by the 3 Geo. IV. *c. 39, within twenty-one [* 625] days after execution, or they will be deemed to be fraudulent and void. If the warrant or cognovit is subject to any defeasance or condition, such defeasance or condition must be written on the same paper or parchment with the warrant or cognovit before it is filed, or the warrant or cognovit will be void. (q). A warrant of attorney with judgment entered up, and execution issued thereon, and bill of sale by the sheriff to the judgment-creditor, has been held to be an assignment of property to such judgment-creditor by the giver of the warrant of attorney. (r) Judges' orders for judgment made by consent, or a copy thereof, if the action is in any other court than the Queen's Bench, must, with an affidavit of the time when such consent was given, and of the residence and occupation of the defendant, be filed in the Queen's Bench within twenty-one days after the making of the order; and the 3 Geo. IV. c. 39, and the 6 & 7 Vict. c. 66, are made applicable to such orders. (s)

Charges on Lands by Statute Merchant, Statute Staple, and Recognizance, when enrolled and certified pursuant to the 29 Car. II. c. 3, sect. 18, and executed pursuant to the 27 & 28 Vict.

(o) This applies to a garnishee order, *Chatterton v. Wetney*, 17 Ch. D. 259.

(p) 32 & 33 Vict. c. 62, sects. 24, 25.

(q) 32 & 33 Vict. c. 62, sect. 26.

(r) *Doe v. Carter*, 8 T. R. 300.

(s) 32 & 33 Vict. c. 62, sect. 27.

c. 112, bind the lands and tenements of the debtor in the hands of all subsequent purchasers and mortgagees. (t) If the debt is not paid at the time appointed, execution may at once be awarded, without any mesne process to summon the debtor, or production of evidence to convict him, and all the lands to which the debtor is then entitled may be taken and delivered to the creditor, who will be entitled to hold them until the debt and costs are satisfied out of the rents and profits.

SECTION III. (u)

MORTGAGES, ETC., OF CHATTELS.

Mortgages of Goods and Chattels.¹ — If goods and chattels are bargained and sold, or granted, or assigned by one man to another upon the terms that the sale or transfer is to be void on the payment of a sum of money at an appointed period, and that the

¹ The American law of chattel mortgages has been lately and fully treated in Herman, *Chattel Mortgages* (1877), and Jones, *Chattel Mortgages* (1881). See also Schouler, *Personal Property*, c. vi.; Martindale, *Conveyancing*, tit. iii. *Mortgages*; Articles on chattel mortgages upon stocks in trade, 20 Alb. L. J. 506; Can a chattel mortgage cover after-acquired property, by T. Tarbel, 21 Alb. L. J. 346; Possession as evidence of fraud, 11 Cent. L. J. 21; Fraudulent mortgages of merchandise, by L. A. Jones, 5 South. L. Rev. n. s. 617; same subject, by J. O. Pierce, 6 South. L. Rev. n. s. 96; Mortgages of future personal property, by L. A. Jones, ib. 221; Rights of material-men, &c., against mortgagees of railroads, by G. T. Bispham, ib. 535; Frauds in chattel mortgages, by L. A. Jones, 7 South. L. Rev. n. s. 95; Fraudulent mortgages of merchandise, by E. J. Maxwell, ib. 205; Validity of unrecorded chattel mortgages as against creditors, by E. McClain, 16 West. Jur. 179.

The decisions are collected in U. S. Dig. tit. *Mortgages*; and see ib. tit. *Fraudulent Conveyances*. More recent cases are: Ownership of colt born while mare is subject to chattel mortgage, *Kellogg v. Lovely*, 46 Mich. 131. Chattel mortgage given by infant voidable, *Miller v. Smith*, 26 Minn. 248. Right of chattel mortgagee to take possession and sell cannot constitutionally be impaired by subsequent legislation, *Boice v. Boice*, 27 Minn. 371. A pre-existing debt is a good consideration for a chattel mortgage, as against attaching creditors, *Turner v. Killian*, 12 Neb. 580. Remedy of mortgagee when the chattels have been wrongfully attached and sold, *Peckinbaugh v. Quillin*, ib. 586. Power of sale, *Clark v. Hyman*, 55 Iowa, 14.

(t) *Ellis v. Reg.*, 8 Exch. 925.

described in Addison on Torts (5th ed., by Cave), pp. 422-432, 451.

(u) The rights and liabilities of parties to bills of sale will be found fully

vendor or transferrer is in the mean time, and until default has been made in payment of the money, to have the possession and use of the things so sold, granted, or assigned, the contract is a * contract of mortgage. If the possession only [* 626] is transferred, the right of property continuing in the transferrer, the contract is a contract of pledge.

A mortgage of goods and chattels may be made by simple contract (a) as well as by deed. If by the terms of a bill of sale or assignment of chattels by way of mortgage the mortgagor is to hold and enjoy the chattels as the mere servant or agent of the mortgagee, or at the will of the mortgagee, the latter is entitled to the possession of them whenever he thinks fit to call for it, and may seize and carry away and sell the property. (b) If the mortgage-debt is to be paid on demand, and the mortgagor is to possess the mortgaged property until default has been made in payment, the mortgagee has no right of possession until demand has been made. (c) If the mortgage-debt is to be paid by a day named, and the mortgagor is to hold possession until default has been made, there is a re-grant and bailment of the goods to the mortgagor for the intervening period, and the mortgagee has no right to the possession of them until the mortgagor's time of holding has expired; and if he takes possession he will subject himself to an action. (d) But if the mortgagor deals fraudulently with the mortgaged goods thus left in his possession, as, if he attempts to sell them, the bailment is determined, the possessory title reverts to the mortgagee, and he may immediately commence an action for the recovery of the goods or their value. (e)

Where the title-deeds of land have been deposited, the equitable mortgagee is entitled to foreclosure; but this doctrine does not apply to a pledgee of personal chattels, who is only entitled to an order for sale. (f)

If goods are assigned to the mortgagee upon trust to permit

(a) *Flory v. Denny*, 7 Exch. 585; 21 L. J. Ex. 223; *Maughan v. Sharpe*, 17 21 L. J. Q. B. 161.

C. B. x. s. 443; 34 L. J. C. P. 19. (e) *Fenn v. Bittleston*, 7 Exch. 152;

(b) *Mayhew v. Suttle*, 4 Ell. & Bl. 12 L. J. Ex. 41.

351.

(c) *Bradley v. Copley*, 1 C. B. 697.

(f) *Carter v. Wake*, 4 Ch. D. 605.

the mortgagor to hold and enjoy them until default has been made in payment of the mortgage-debt and interest by a day named, and upon further trust to sell them upon such default being made, the mortgagee has the legal right of possession incumbered with the trust as well as the right of property, and may maintain an action against any one who wrongfully converts them to his own use. (g) A proviso in a mortgage of chattels that, after default made in payment of the mortgage-debt after notice, it shall be lawful for the mortgagee to receive and take into possession, and thenceforth to hold and enjoy, the [* 627] mortgaged chattels, and to sell and dispose of * them, and that until default it shall be lawful for the mortgagor to hold and make use of them, does not prevent the mortgage from operating as an immediate transfer of the right of property in the chattels to the mortgagee. The latter is the legal owner, whether in or out of possession. (h)

A mortgage of goods and chattels and movables (excepting ships) will in general be found to be a doubtful and inadequate security for the payment of money; for as the mortgagor is left in the possession of the goods and continues the apparent owner of them, he will be able to defeat the title of the mortgagee in a variety of ways. He may sell the goods in market overt to a *bona fide* purchaser without notice of the mortgage, and so divest the mortgagee of his right of property in them, and deprive him of his security; and if the mortgagor becomes bankrupt, the chattels may become lost to the mortgagee by reason of their having been left in the possession of the mortgagor as reputed owner. (i)

Pledges of Goods and Chattels.¹— We have already seen that if the possession only of goods and chattels is transferred, the right of property continuing in the transferrer, the contract is a contract of pledge (*ante*, p. * 626).

Things which may be given in Pledge.— By the common law

¹ See 2 Kent, Com. 577; Biddle, Stockbrokers, 321–387; Schouler, Pers. Prop. c. 5; Waples, Proc. in Rem. Book II.; U. S. Dig. tit. *Pledge*; also ib. tit. *Bailment*; article on Equitable liens, 14 Cent. L. J. 42.

(g) *White v. Morris*, 11 C. B. 1015; (i) *Shuttleworth v. Hernaman*, 1 De 21 L. J. C. P. 185. G. & J. 322.

(h) *Gale v. Burnell*, 7 Q. B. 850.

all kinds of goods and chattels, title-deeds, and securities for money, promissory notes and bills of exchange, letters of allotment and scrip, certificates of shares, and even money itself when marked or enclosed in a bag, purse, or parcel, so as to be capable of identification, may be pledged. (*k*)

Parties entitled to pledge. — One man cannot, as a general rule, convey to another a power or right over property which he does not himself possess. If a servant takes his master's jewels and pledges them, the pledge cannot alter or affect the ownership of them, or give the pledgee any right to detain them as against the owner. (*l*) But if a man obtains goods under color of a contract intended to transfer the property in the goods to him, and then pledges them, the pledgee will have a lien upon the goods to the amount of his advances. If, for example, a man purchases and obtains possession of a specific chattel, and pays for it by a fictitious bill of exchange or by a cheque on a banker where he has no funds, and then pledges the article with a party who advances money upon it without any knowledge of the fraud, the pledgee will have a lien upon his advances against the vendor who has been defrauded; (*m*) but if the property has not passed, — if, for instance, *the article [* 628] has been stolen, or possession thereof has been obtained by false pretences, — and it has then been pledged, the pledgee will have no lien upon it as against the owner. If a person obtains possession of a delivery-order, dock-warrant, or any documentary evidence of title to goods on the faith of a false and fraudulent representation, and obtains possession of the goods under the order, or gets them transferred into his name, or obtains warrants for their delivery to his order, and then pledges the goods or warrants, the pledgee will have no title to detain them as against the owner who has been defrauded. (*n*) If the pawnor has only a limited interest in the subject-matter of the pledge, he can only pawn to the extent of such interest; and when that expires, the pawnee must surrender the pledge to the party who

(*k*) *Isaack v. Clark*, 2 Bulstr. 306; *White v. Garden*, 10 C. B. 926; 20 L. J. Ross v. Moses, 1 C. B. 232. C. P. 168.

(*l*) 34 Hen. VI. fol. 25, pl. 33; *Hartop v. Hoare*, 3 Atk. 44; 2 Str. 1187.

(*n*) *Kingsford v. Merry*, 1 H. & N. 503.

(*m*) *Parker v. Patrick*, 5 T. R. 175;

succeeds to the legal ownership. Therefore, where a quantity of plate was settled upon a widow for life, and she pawned it and then died, it was held that the pawnee had no right to detain the pledge as against the remainder-man, although he had no notice of the widow's limited interest at the time he advanced the money. (o) If the vendor of an estate delivers the conveyance as an escrow, to take effect on payment of the residue of the purchase-money, the property of the title-deeds is so vested in the purchaser that the vendor, obtaining possession of them and pawning them, confers on the pawnee no right to detain them after tender of the residue of the purchase-money. (p)

Implied Warranty of Title on the Part of the Pledgor. — Every person who pledges goods and chattels and personal property impliedly undertakes that the property pledged is his own; and if it turns out not to be so, the pledgee may restore it to the lawful owner coming forward and claiming the goods, and may set up the *jus tertii* in answer to an action by the pledgor for the recovery of the pledge. (q) Every person, on the other hand, who receives goods and chattels into his possession by way of pawn or pledge, impliedly undertakes to return them to the pawnor as soon as the object of the pledge has been accomplished, unless it be shown that the pledgor had no right to pledge them, and the owner has intervened and claimed them. Nothing contained in the factors' acts is to prevent (5 & 6 Vict. c. 39, sect. 7) the owner from having the right to redeem such goods or [* 629] documents of title, at any time * before they have been sold, upon repayment of the amount of the lien thereon. If the pledge has been received as security for the due payment of a debt or the performance of a contract, it must be returned by the pawnee as soon as the debt is discharged or the contract has been fulfilled, unless it has been lost or destroyed by accident, without any default or misconduct or want of proper care on the part of such pawnee.

(o) *Hoare v. Parker*, 2 T. R. 376.

(p) *Hooper v. Ramsbottom*, 6 Taunt. 12.

(q) *Cheesman v. Exall*, 6 Exch. 344; *Jones v. Peppercorne*, 28 L. J. Ch. 158; *Biddle v. Bond*, 34 L. J. Q. B. 137;

unless he always knew that the pledgor had no title and that the adverse claimant had, and has dealt with the goods in a way creating an estoppel. See *Ex parte Davies*, 19 Ch. D. 86.

The act protects every *bona fide* advance, but only *bona fide* advances, not antecedent liabilities (whether they may or may not have ripened into debts) where no actual advance is made at the time of the pledge. Therefore, where a factor pledged goods of his principal with G : first, to secure the payment of an acceptance of the factor's in G's hands, not then due, which had been given to protect G's liability on a contract as the factor's broker ; secondly, to repay G his loss on a resale of goods which G had purchased for the factor in his own name, it was held that the transaction was not within the act. (r)

By the 40 & 41 Vict. c. 39, sect. 2, where any agent or person has been intrusted with and continues in the possession of any goods, or documents of title to goods, within the meaning of the principal acts as amended by this act, any revocation of his intrustment or agency shall not prejudice or affect the title or rights of any other person who, without notice of such revocation, purchases such goods, or makes advances upon the faith or security of such goods or documents.

By sect. 3, where any goods have been sold, and the vendor or any person on his behalf continues or is in possession of the documents of title thereto, any sale, pledge, or other disposition of the goods or documents made by such vendor, or any person or agent intrusted by the vendor with the goods or documents within the meaning of the principal acts as amended by this act so continuing or being in possession, shall be as valid and effectual as if such vendor or person were an agent or person intrusted by the vendee with the goods or documents within the meaning of the principal acts as amended by this act, provided the person to whom the sale, pledge, or other disposition is made has not notice that the goods have been previously sold.

By sect. 4, where any goods have been sold or contracted to be sold, and the vendee, or any person on his behalf, obtains the possession of the documents of title thereto from the vendor or his agents, any sale, pledge, or disposition of such goods or documents by such vendee so in possession or by any other person or agent intrusted by the vendee with the documents within the meaning * of the principal acts as [* 630]

(r) *Macnee v. Gorst*, L. R. 4 Eq. 315.

amended by this act, shall be as valid and effectual as if such vendee or other person were an agent or person intrusted by the vendor with the documents within the meaning of the principal acts as amended by this act, provided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods.

By sect. 5, where any document of title to goods has been lawfully indorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement (or by delivery where the document is by custom, or by its express terms transferable by delivery, or makes the goods deliverable to the bearer) to a person who takes the same *bona fide* and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.

Of the Pledgor's Right of Redemption.—A thing may be pledged for a certain period, or it may be pledged indefinitely, no time being fixed for its redemption, or for the happening of the event which is to give the pledgor a right to have it back. In the first case the pledgee cannot demand payment of the debt, nor can the pledgor lawfully demand the restoration of the pledge, until the time appointed has expired. In the second case the pledgor is entitled to redeem at any time, by tendering to the pledgee the amount due to him, and the pledgee may compel the pledgor to redeem, or be foreclosed and lose his right of redemption altogether. The rights and remedies conceded by the common law to the pledgors and pledgees of lands and chattels in the twelfth century, before the modern system of mortgage had sprung up, are described in the learned and interesting treatise of Ranulph de Glanville. (*s*) At the present day, if the debtor pays the debt due, or tenders it to the creditor, and demands the pledge, and the creditor refuses to deliver it up, the debtor may maintain an action for its recovery, unless his right to redeem has been barred by judgment of foreclosure, or has been forfeited under an express clause of forfeiture inserted in the original contract, or unless the pledge has been sold by the

(*s*) Beames's Glanville, p. 260.

creditor pursuant to a power of sale reserved to him. (*t*) It is laid down in the Roman law that mere length of possession alone by the pledgee will not have the effect of vesting the pledge in him, and that his heirs and executors remain perpetually obliged to restore the pledge, and cannot *ac- [* 631] quire the ownership and right of property thereof by prescription. (*u*)

Sale of the Pledgor's Right of Property and Right of Redemption. — As the ownership and general right of property in the pledge remain vested in the pledgor, the latter may sell the pledge subject to the lien of the pledgee, and substitute the purchaser in his place, so as to entitle the latter to redeem. (*x*) If several chattels are pawned for one sum, separate sales may be made of each to different purchasers; but the pawnee will not be bound to part with any of the chattels until his whole debt is paid. Subject to the claim of the pawnee, the pawnor has the same right over each chattel separately which he had before the pawn was made.

Forfeiture of the Pledge. — By the early Roman law the debtor and creditor might agree that, if the debtor did not pay the debt within a specified period, the pledge should be forfeited, and should become the absolute property of the creditor. But a law of Constantine prohibited such contracts, on the ground that they were unjust and oppressive to debtors, and declared that every agreement should be null and void which provided that the thing pledged should pass to the creditor without any sale or appraisement, or that the debtor should forfeit his right of redemption if he failed to pay at the proper time. (*y*) This law of Constantine has been imported into the French law (*z*) and the modern law of Continental Europe. "The creditor cannot," observes Domat, "stipulate that, if he is not paid at the time appointed, the thing pledged shall become his own property, for such an agreement would be *contra bonos mores*; for the

(*t*) *Ratliffe v. Davies*, Cro. Jac. 245; *Yelv.* 178; 1 Bulst. 29, 31; *Kemp v. Westbrook*, 1 Ves. Sen. 278.

(*u*) Cod. lib. 10, tit. 24, lex 10.

(*x*) *Franklin v. Neate*, 13 M. & W. 486.

(*y*) Cod. lib. 8, tit. 35, lex 3; *Mackeldey's Civil Law*, by Kaufman, sect. 349.

(*z*) "Cette loi a été adoptée dans notre jurisprudence. Elle est nécessaire pour empêcher les fraudes des usuriers." — *POTH. Nantissement*, No. 18.

pledge is given to the creditor only as a security for the debt, and not to enable him to profit by the indigence of his debtor. (a) Our own common law does not follow the later Roman and Continental law in this respect, and has not, hitherto, considered agreements for the forfeiture of pledges to be null and void, as being contrary to public policy. The court, however, acting in accordance with the rules and principles of the civil law, will relieve against the forfeiture, as we have already seen, in the case of pledges of land (*ante*, p. * 600); but it will not, in general, interfere in the case of pledges of movables, (b) unless the value of the pledge greatly exceeds the amount of the debt which it was intended to secure.

Foreclosure of the Right of Redemption — Pledgee's

[* 632] **Power of * Sale.**—It would appear to be an implied term of every contract of pledge that the thing deposited shall be made available for the liquidation of the debt it was intended to secure, in case the pledgor is unable or unwilling to pay such debt. (c) The law will not condemn the pledge to remain useless in the hands of the creditor, or suffer it to perish, but will enable the latter, after due notice given to the debtor, and every fair opportunity afforded him to redeem, to sell the pledge and appropriate the proceeds of the sale in liquidation and discharge of the debt, paying over the surplus that may remain to the creditor; (d) or, if the value of the pledge does not exceed the amount of the debt due upon it and the costs and expenses of a sale, the creditor will be allowed to appropriate the pledge to his own use, and hold it as his own property, discharged of all claim of ownership and right of redemption on the part of the creditor. The ancient form of foreclosing or barring the pledgor's right of redemption by writ of summons commanding him to redeem the pledge or appear in court and answer the complaint of the pledgor, and admit or deny the pledge and the debt, is described by Glanville. If the debtor appeared and admitted the pledge, he was commanded to redeem it within a reasonable period; and if he failed to comply, liberty

(a) Domat, liv. 3, tit. 1, sects. 3, 11.

(b) Lockwood v. Ewer, 9 Mod. 278.

(c) Story on Bailments, sect. 311.

(d) Pigott v. Cubley, 15 C. B. x. s.

701; 33 L. J. C. P. 134; Willes, J.,

Martin v. Reid, 31 L. J. C. P. 126.

was given to the creditor from that time to treat the pledge as his own property, and dispose of it as his own. If the debtor denied the pledge and the debt, the creditor was put to the proof thereof. (e)

Lord Hardwicke is reported to have said that a decree of foreclosure is not necessary, in cases of pledges of personal chattels, to bar the pledgor's right of redemption and enable the pledgee to sell; (f) but so long as the ownership and right of property in the pledge have not been vested in the pledgee, the latter cannot sell more than his own claim or lien upon the pledge, and can only transfer the pledge burthened with the pledgor's right of redemption, unless a power of sale has been expressly or impliedly reserved to him by contract. (g) In order to make himself the owner of the pledge, the pledgee must bar the pledgor's right of redemption by a decree of foreclosure. (h) "A right of lien gives no right to sell the goods;" but if it is reasonably to be inferred, from the nature of the transaction between the parties, that the contract was to this effect, "If I (the borrower) repay the money, you must re-deliver the goods; but if I fail to repay it, you may use the security I have left in your hands to repay yourself," the *pledgee will then [*633] be entitled to sell, after notice to the pledgor of his intention, and may satisfy the debt out of the proceeds of such sale. (i) If the deposit has been made to secure the payment of a sum of money by a day certain, there is, it has been held, an implied authority to sell in case of non-payment by the day named; (k) but notice should be given to the debtor, in order to bar the equity of redemption. If notice is given to the pledgor that, unless the pledge is redeemed and the debt due thereon paid by a given day (a reasonable time for redemption being allowed), the pledge will be sold by public auction, and the proceeds of the sale applied in liquidation of the debt, and the pledgor neglects to redeem, and pays no attention to the

(e) Beames's *Glanville*, 254, n. 1.

(i) *Pothonier v. Dawson*, Holt, 385;

(f) *Lockwood v. Ewer*, 9 Mod. 279.

Smart v. Sanders, 3 C. B. 401; 5 ib.

(g) *Mickelthwaite v. Merrill*, 19 L. T. 915.

R. 61.

(k) *Pigott v. Cubley*, *ante* p. * 632.

(h) *Wayne v. Hanham*, 9 Hare, 62;

20 L. J. Ch. 530.

notice, and the sale then takes place, the pledgor may fairly be deemed to have authorized the sale, or to be an assenting party thereto. (*l*)

By the Roman law, the contract of pledge was held to carry with it an implied authority from the pledgor to the pledgee to sell the pledge in case of non-payment of the debt due thereon. In conducting the sale, the creditor was deemed to be the mandatary or agent of the debtor, selling on behalf of the latter; and he was consequently bound to promote the interests of the debtor to the utmost of his power. He could not himself become the purchaser of the pledge, either directly or indirectly. An action for eviction from want of title could not be brought against him by the purchaser after the sale, but only against his principal, the pledgor, unless he had sold *mala fide*, or without any right to sell, in which case he was himself responsible for all the damages that resulted from the sale. (*m*) If, after the pledge had been offered for sale with the necessary formalities, an acceptable purchaser could not be found, the creditor might then apply to the court to have it appraised and adjudged to him at its value. Still, even in this last case, the debtor had a right of redemption for two years after the decree. (*n*) If it was made part of the contract that the creditor should be entitled to take the pledge himself in case of default, at a price to be mutually agreed upon between himself and the debtor, or to be fixed by the court or some third party, this agreement might be enforced as a conditional sale. (*o*) In the French law, when an express power of sale has been reserved by the contract, the creditor may summon the debtor to pay, and in default of payment procure a [* 634] judge's order for the sale, after a * certain time to be given for redemption at the discretion of the judge. (*p*)

Accounts between Pledgor and Pledgee.—Whenever the pledge has been sold by the pledgee, he is liable to be called upon to account for the proceeds of the sale, and to pay over to the pledgor any surplus that may be found to exist after deduct-

(*l*) Tucker v. Wilson, 1 P. Wms. 260.

(*n*) Cod. lib. 8, tit. 22, tit. 34; Dig.

(*m*) Dig. lib. 20; lib. 13, tit. 8, lex 4; lib. 42, tit. 1.

Cod. lib. 4, tit. 24; lib. 8, tit. 13-34; Mackeldey's Civil Law, sect. 350.

(*o*) Dig. lib. 20, tit. 1, lex 16, sect. 9; Domat, liv. 2, tit. 1, sects. 3, 11.

(*p*) Domat, liv. 3, tit. 1, sects. 3, 10.

ing the debt, costs, and expenses. The possession of the pledge does not suspend the right of the pledgee to proceed personally against the pledgor for the recovery of the debt in respect of which the pledge was taken, as it is only a collateral security. (*q*) In the Roman law, if the pledgee neglected to make the pledge available for the liquidation of the debt when he ought to have done so by the terms of the contract, he could not proceed personally against the debtor. (*r*)

Of the Custody and Safe-Keeping of the Pledge.— Every person who receives goods and chattels or securities into his possession by way of pawn or pledge impliedly undertakes to take the same care of them that a prudent and cautious man ordinarily takes of his own property. His liability, in this respect, is analogous to that of the hirer of chattels for use (*ante*, p. * 343), the contract being, like the contract of letting and hiring, a contract for the mutual benefit of both parties, and not a contract for the sole and separate advantage of one of them to the exclusion of the other, like the contract of deposit or the contract of borrowing and lending. The pawnee or pledgee, consequently, is not responsible for the loss of the goods by robbery or accident, if he has taken ordinary and reasonable care of them; (*s*) and he may, notwithstanding the loss and his consequent inability to return the deposit, sue for the recovery of his debt. But if the goods have been stolen under circumstances manifesting a want of ordinary and reasonable care for their safety, he will of course be responsible for the loss. And it is not enough for the pawnee to say that the goods have been lost by robbery or accident; he must prove the fact, and show that he was free from blame. (*t*)

Use of Things pledged. — “If the pawn be something that will be the worse for wear, as clothes, the pawnee cannot use it; but

(*q*) *Lawton v. Newland*, 2 Stark. 72; *South Sea Company v. Duncomb*, 2 Str. 919; *Holt*, 461; *Anon.*, 12 Mod. 564; *Scott v. Parker*, 1 Q. B. 809.

(*r*) *Pand. lib. 10, tit. 6; Cod. lib. 8; tit. 14, lex 24.*

(*s*) *Syred v. Carruthers*, Ell. Bl. & Ell. 469; 27 L. J. M. C. 273. “Placuit sufficere, si ad eam rem custodiendam

exactam diligentiam adhibeat, quam is præstiterit, et aliquo fortuito casu rem amiserit, securum esse, nec impediri creditum petere.” — *Inst. lib. 3, tit. 15, sect. 4*, copied by *Bracton*, 99 b; *Dig. lib. 13, tit. 6, lex 5, sect. 2; tit. 7, lex 14.*

(*t*) *Doorman v. Jenkins*, 2 Ad. & E. 256; *Cod. lib. 4, tit. 24, lex 5; Glanville* by *Beames*, p. 253.

if it will not be the worse for wear, as jewels, the [* 635] pawnee may use * them ; but then it must be at his peril, for if he is robbed in wearing them he is answerable. Also if the pawn be of such a nature that the keeping is a charge to the pawnee, as if it be a cow or horse, the pawnee may milk the cow or ride the horse ; and this is in recompense of the keeping. If the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them at all events ; because the pawnee, by detaining them after tender of the money " (the time of payment having arrived, or no time being fixed), " is a wrongdoer, and it is a wrongful detainer of the goods ; and a man that keeps goods by wrong must be answerable for them at all events." (u)

If a pawnee re-pawns or sells before any default in payment by the original pawnor, the latter cannot sue the sub-pawnee or vendee to recover the pledge without paying or tendering the amount for which the pledge was originally made. (x)

As the right of property in the pledge remains, as we have already seen, in the pledgor until foreclosure, forfeiture, or sale, the pledgor may maintain an action against a stranger who unlawfully possesses himself of the goods ; but if there is any injury or conversion by a stranger for which an action will lie on the part of both the pledgor and pledgee, a recovery by one ousts the other of his right to recover ; for there cannot be a double satisfaction. (y) If the pledgor has sold his interest in the pawn to a third party, the latter will be the proper person to sue for damages resulting from injury to the pawn from the default or negligence of the pawnee, as the owner for the time being is the proper plaintiff. (z)

Statutory Rights and Liabilities of Pawnbrokers. — The rights and liabilities of pawnbrokers are now regulated by the Pawn-

(u) *Coggs v. Bernard*, 2 Ld. Raym. Q. B. 232 ; 7 B. & S. 783 ; *Halliday v. 912* ; *Smith's Leading Cases*, 5th ed., Holgate, L. R. 3 Ex. 299 ; 37 L. J. Ex. 182.

(x) *Johnson v. Stear*, 15 C. B. n. s. 330 ; 33 L. J. C. P. 130 ; *Johnson v. L. & Y. Ry. Co.*, 8 C. P. D. 499 ; *Donald v. Suckling*, L. R. 1 Q. B. 585 ; 35 L. J. 486.

(y) *Bac. Abr. Trover (C)* ; *Rooth v. Wilson*, 1 B. & Ald. 59.

(z) *Franklin v. Neate*, 13 M. & W.

brokers' Act, 1872, (a) which took effect from Dec. 31, 1872. The act, however, does not apply to loans of above ten pounds, or to loans made before the commencement of the act, which are regulated by the old law.

Who are to be deemed Pawnbrokers.— Every person who keeps a house, shop, or other place for the purchase or sale of goods or chattels, or for taking in goods or chattels by way of security for money advanced thereon, and who purchases, or receives, or takes in any goods or chattels, and pays, or advances, or lends thereon any sum of money not exceeding £10, with or under any * agreement or understanding, express [* 636] or implied, or to be from the nature and character of the dealing reasonably inferred that such goods or chattels may be afterward redeemed or re-purchased on any terms whatever, is to be deemed to be a pawnbroker within the meaning of the act. (b) Every pawnbroker's name must be placed over the door of his place of business; (c) and therefore a secret partnership in the business of a pawnbroker is illegal and void. (d)

Sale of Things pledged.— Pawnbrokers' sales are regulated by the provisions of the Pawnbrokers' Act. If at any time before the sale has actually taken place the pledgor tenders the principal, interest, and expenses incurred, he has a right to have back the things pledged, and the pawnbroker cannot lawfully proceed with the sale. (e)

Warranties on Sales of Unredeemed Pledges.— We have already seen that, in the case of sales by pawnbrokers of unredeemed pledges expressly sold as such, the pawnbroker only warrants the subject-matter of the sale to be a pledge, the time for the redemption of which has expired. He sells merely his own title and interest in the pledge, and it is the duty of a purchaser to investigate that title (*post*, pp. * 971, * 972; *Contracts of Sale*, 490); and if he is evicted by reason of the want of title in the pledgor to make the pledge, he has no remedy over against the pawnbroker, unless the latter expressly warranted the title.

(a) 35 & 36 Vict. c. 93.

(b) 35 & 36 Vict. c. 93, sect. 6.

(c) 35 & 36 Vict. c. 93, sect. 13.

(d) *Armstrong v. Lewis*, 2 Cr. & M.

297; 3 Myl. & K. 53; *Gordon v. Howden*, 12 Cl. & Fin. 242; *Frazer v. Hill*, 1 Macq. H. L. C. 392.

(e) *Walter v. Smith*, 5 B. & Ald. 441.

The indemnity given by sect. 25 to a pawnbroker who delivers a pledge to the person producing the pawn-ticket applies only as between the pawnor or owner who has authorized the pledging of the goods, but does not affect the common law rights of an owner of goods pledged against the owner's will. (*f*)

Imperfect Hypothecation of Goods and Chattels — Licenses to distrain to secure Payment of a Debt. — The common law repudiates the hypothecation of chattels or movables in its general and extended signification; for if parties who had bought things in a public market, or in the ordinary way of trade, of persons who had the possession and visible ownership of them, were liable, after they had paid the purchase-money, to be called upon by third parties who had secret charges or liens upon such goods for further payment, all public confidence would be destroyed, and trade and commerce annihilated. But the law permits goods and chattels to be subjected to what is called by Continental

jurists imperfect hypothecation, *i. e.* a debtor may, by [* 637] deed under seal, grant to his *creditor a right to seize and sell a specified chattel, or all his goods and chattels generally, in satisfaction and discharge of the debt, in case of the non-payment thereof at an appointed period. Such a power gives the creditor no right to follow the goods into the hands of third parties; but so long as they remain in the possession of the debtor himself and continue his property, the creditor may seize them in the same way that a landlord distrains and sells the goods and chattels of his tenant on the demised premises for rent in arrear. (*g*) A power of this description may be made to extend to all the after-acquired chattels of the debtor, as well as to the goods and chattels of which he was possessed at the time of the contract or grant, and is analogous to the power possessed by a creditor in the Roman and Continental law under a general hypothecation of present and after-acquired property. Where the owner of a cow, being indebted to the defendant for agistment, and being desirous of contracting a further debt for straw, &c., agreed with the defendant that the cow should stand as a security for the debt, and that the defendant should be at liberty, upon

(*f*) *Singer Manufacturing Co. v. Clark*, 5 Ex. D. 37.

(*g*) *Chidell v. Galsworthy*, 6 C. B. N. S. 471.

a certain contingency to take the cow wherever he could find her and hold her till he was paid, and, the contingency having happened, the defendant seized the cow, it was held that he had a right so to do, and that he was entitled to detain her as against the owner until he received payment of his debt. (h) The right of detainer gives no right of sale, although it is exercised at great expense; (i) but if a debtor gives to his creditor a license to enter upon his land and seize his cattle and crops and sell them in satisfaction and discharge of the debt, the license will be justified as against the licensor in seizing and selling under the license. (k) But the operation of a license of this description cannot be extended beyond the immediate parties to it; and, therefore, as soon as the rights of third persons intervene, the power or authority becomes nugatory and useless. Thus, where a vendor entered into a written agreement for the sale of a coach on credit, upon the terms that if the price was not paid pursuant to the agreement he "should have and hold a claim upon the coach," and the purchaser died, and, the money not being paid, the vendor got possession of the coach and detained it as a security for the debt, it was held that, although he would have been justified in so doing as between himself and the purchaser, yet, the latter being dead, he had no right to detain it as against the purchaser's personal representative, (l) or against a trustee in bankruptcy. (m) Neither *can the [* 638] license be assigned or granted over to another so as to enable the assignee to distrain upon the licensor; (n) nor can it prevail against the claim of a judgment creditor, so long as parties claiming under it have not perfected their title by taking possession of the property before it is seized in execution by the sheriff. A legal interest in the property, *bona fide* acquired before possession taken by the person claiming under the license, will prevail over the claim of the latter. (o) A promise to pay money when the debtor receives a debt due to him from

(h) Richards v. Symons, 8 Q. B. 90.	(n) Brown v. Metropolitan Counties,
(i) Thames Ironworks, &c., v. Patent	&c., 28 L. J. Q. B. 236.
Derrick Co., 29 L. J. Ch. 714.	(o) Reeve v. Whitmore, Martin v.
(k) Carr v. Allatt, 27 L. J. Ex. 385.	Whitmore, 33 L. J. Ch. 63; and see
(l) Howes v. Ball, 7 B. & C. 484.	Holroyd v. Marshall, 33 ib. 193.
(m) Carr v. Acraman, 11 Exch. 566.	

a third person does not amount to an equitable charge on the debt. (*p*)

Revocation of the License by Act of Bankruptcy.—A license to seize and sell chattels in satisfaction and discharge of a debt gives no title to any specific chattels; but when executed by the creditor's taking possession of property under the license, it clothes the licensee with the ownership of such property. (*q*) If, therefore, a debtor, after he has granted his creditor a license of this description, assigns all his property to trustees for the benefit of the creditors, the license will be annulled as regards the property so assigned; and if the assignment should be void as being an act of bankruptcy, the property would be transferred to the trustee in bankruptcy free from the operation of the license. (*r*)

Mortgages of Ships and of Shares in Vessels.¹—It was at one time held that the Court of Chancery would give no effect to a contract to assign a ship as security for money due not registered in accordance with the 17 & 18 Vict. c. 104. (*s*) But by the 25 & 26 Vict. c. 63, sect. 3, the expression "beneficial interest," whenever used in the second part of the 17 & 18 Vict. c. 104, includes interests arising under contract and other equitable interests; and the intention of that act is declared to be that, without prejudice to the provisions contained therein for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the act on registered owners and mortgagees, and without prejudice [* 639] dice to the provisions therein contained relating *to the exclusion of unqualified persons from the ownership of

¹ Herman, Chat. Mortg. c. 13; Pars. Shipp. & Adm. c. 2, 3; 1 Schouler, Pers. Prop. 559-562; Waples, Proc. in Rem. c. 44; Desty, Shipp. & Adm.; Abb. Nat. Dig. tit. *Shipping*, II.; U. S. Dig. tit. *Shipping*, II.

(*p*) *Field v. Megaw*, L. R. 4 C. P. 660.

(*q*) *Congreve v. Evetts*, 10 Exch. 308; 23 L. J. Ex. 273.

(*r*) *Carr v. Acraman*, 11 Exch. 566; 25 L. J. Ex. 90; *Baker v. Gray*, 17 C. B. 462; 25 L. J. C. P. 161.

(*s*) *Liverpool Borough Bank v. Turner*, 29 L. J. Ch. 827; see *Chasteau-neuf v. Capeyron*, 7 Ap. Cas. 127. A British ship seems to be a ship intended to be the property of a British owner. *Union Bank of London v. Lenanton*, 3 C. P. D. 243, C. A.

British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property. (*t*) The mortgagee is not to be deemed to be the owner of the ship or share, (*u*) nor the mortgagor to have ceased to be owner, except in so far as may be necessary for making such ship or share available as a security for the mortgage-debt. The mortgagor in possession may employ and charter the ship, and the court will restrain the mortgagee from interfering with his contracts. (*x*) The mortgagee has power absolutely to dispose of the mortgaged ship or share, and to give effectual receipts for the purchase-money; but when there are several mortgages no subsequent mortgagee can, except under an order of court, sell such ship or share without the concurrence of every prior mortgagee. A registered mortgage of a ship or share is not affected by any act of bankruptcy committed by the mortgagor after the date of the record of the mortgage, notwithstanding the mortgagor at the time of his becoming bankrupt may have the ship in his possession and disposition, and be reputed owner thereof. Provision is made for the transfer of mortgages, and for the transmission of the interest of mortgagees by death, bankruptcy, insolvency, or marriage. (*y*) The guardian of a registered infant owner of a ship has no power under the Merchant Shipping Act, sect. 99, to sell or mortgage the ship on behalf of the infant. (*z*)

A mortgagee who takes possession of a ship, or gives the charterer notice of his mortgage, and demands the freight before the freight becomes payable, is entitled, as against the mortgagor and his assigns, to receive it; (*a*) but until the mortgagee takes possession or does some equivalent act, the mortgagor is entitled

(*t*) See *Ward v. Beck*, 32 L. J. C. P. 113; and *Hughes v. Sutherland*, 7 Q. B. D. 160.

(*u*) *European, &c. Co. v. Royal Mail, &c. Co.*, 4 K. & J. 676; *Dickinson v. Kitchen*, 8 Ell. & Bl. 789; *Marriott v. Anchor Reversionary Co.*, 30 L. J. Ch. 122, 571.

(*z*) *Collins v. Lamport*, 34 L. J. Ch. 196.

(*y*) 17 & 18 Vict. c. 104, sects. 66-83.

(*z*) *Michael v. Fripp*, L. R. 7 Eq. 95; 38 L. J. Ch. 29.

(*a*) *Rusden v. Pope*, L. R. 3 Ex. 269; 37 L. J. Ex. 137; *Brown v. Tanner*, L. R. 3 Ch. 597; 37 L. J. Ch. 923; *Wilson v. Wilson*, L. R. 14 Eq. 32; 41 L. J. Ch. 423.

to the freight, and is not accountable to the mortgagee for what he receives. (b) When the mortgage is of the entirety of the vessel, the mortgagee may take exclusive possession; when it is of shares only, he cannot take possession so as to prevent the other part-owners from also taking possession. A mortgagee of shares in a ship may, without formally taking possession, give notice of his * interest and require payment to himself of his share of the freight. (c) Until possession is taken by the mortgagee, the mortgagor remains *dominus* of the ship as to its employment or rate of freight. (d) A mortgagee of a ship is entitled to payment in priority to materialmen not in such actual possession at the time of supplying the materials as to give them a lien. (e) A subsequent mortgage, duly registered, of a ship, has priority over a claim for necessities. (f) The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereout not only what is due on his first mortgage, but also the amount of any subsequent charge he may have acquired on the freight, in priority to every equitable charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight. (g) The effect of an omission to register a mortgage of a ship is to postpone the mortgagee's claim to that of a subsequent registered mortgagee or transferee; but such omission is no answer to a claim by the first mortgagee for freight, as against a purchaser of the cargo without notice of the mortgagee's title. (h) A claim by a master for disbursements takes rank as a maritime lien, and is prior to the claim of the mortgagee of the ship. (i)

(b) *Keith v. Burrows*, 2 Ap. Cas. 636. Two Ellens, L. R. 3 Ad. 345; 41 L. J. Ad. 33.

(c) *Cato v. Irving*, 21 L. J. Ch. 675; *Willis v. Palmer*, 7 C. B. n. s. 340; 29 L. J. C. P. 194; *Gardner v. Cazenove*, 1 H. & N. 435; 26 L. J. Ex. 17. (g) *Liverpool Marine Credit Co. v. Wilson*, L. R. 7 Ch. 507; 41 L. J. Ch. 798.

(d) *Keith v. Burrows*, 2 Ap. Cas. 636. (h) *Keith v. Burrows*, 1 C. P. D. 722, reversed on appeal upon another point; 2 C. P. D. 163; affirmed 2 Ap. Cas. 636.

(e) *The Scio*, L. R. 1 Ad. 353.

(f) *The Pacific*, 2 B. & L. 243; *The Mary Anne*, 35 L. J. Adm. 6.

Maritime Liens — Bottomry.¹ — The contract of hypothecation of ships known to the civil law, and enforced in our courts of admiralty, is a contract whereby the captain of a vessel in a foreign port, not having any credit in the port where the vessel is lying, is enabled to obtain money for the repair and equipment of the vessel, and for supplies and sea stores for the prosecution of the voyage, (*k*) by creating a charge or lien upon the vessel itself in favor of the lender, so that if the vessel is sold or mortgaged by the owners it will pass burthened with the charge or debt into the hands of the purchaser or mortgagee. The charge or lien created by a contract of this description is called a maritime lien. Wherever a maritime lien exists, it gives a right or claim upon a vessel, *jus ad rem*, to be carried into effect by legal process. This claim travels with the vessel into whosoever possession it may * come, and [* 641] is enforced in the Court of Admiralty by a proceeding *in rem*. (*l*)

By the Roman law every person who repaired or fitted out a vessel, or lent money for those purposes, had a lien upon the ship without a formal instrument of hypothecation. But by the law of England no such right can be acquired but by express agreement, and a ship-master can only make such an agreement if he act within the scope of his authority. The contract by which a maritime lien is generally created by English ship-masters is termed a contract of bottomry, from the keel or bottom of the vessel being generally expressly hypothecated, or charged with the payment of the debt, and being used figuratively in the contract to denote the whole ship. It is essential to the validity of this species of hypothecation that the sea risk should be incurred by the lender, that is to say, that the debt

¹ Pars. Shipp. & Adm.; Desty, Shipp. & Adm.; Article on Maritime Liens, by T. M. Etting, 21 Am. L. Reg. n. s. 1; ib. 81; ib. 145; Article on Some Features of Maritime Liens, 16 Am. L. Rev. 193; Abb. Nat. Dig. tit. *Admiralty*; *Bottomry*; *Respondentia*; *Shipping*; U. S. Dig. tit. *Admiralty*; *Shipping*.

(*k*) The *Huntley*, 1 Lush. 24; The *Edmond*, 30 L. J. Adm. 128; but disbursements for charges for which the consignee of the cargo is liable are not the subject of bottomry. *Ib.*

(*l*) *Harmer v. Bell*, 7 Moore, P. C. 267; *Menetone v. Gibbons*, 3 T. R. 267; *Ladbroke v. Crickett*, 2 ib. 649.

should be incurred, and charged upon the vessel, upon the understanding that if the vessel is lost, the lender loses his money, but if it arrives safe at the port of destination, it shall stand charged with the payment of the debt. The master has no authority to hypothecate the vessel in any other manner; (*m*) and the Court of Admiralty has no jurisdiction to enforce any other contract. (*n*) As a remuneration for this risk, the creditor has always been entitled to take and charge upon the vessel any rate of interest or remuneration for the loan or debt that the parties might agree upon, termed maritime interest. (*o*) The only events which will discharge a bottomry bond are payment and an absolute total loss. A constructive total loss of the ship does not discharge the bond. (*p*)

Of the Power of Hypothecation of the Ship-Master.—The extent of the authority of the master of a vessel to bind the owners either of the ship or cargo is derived from and governed by the law of the flag. (*q*) By our law the ship-master has no right to create a lien upon the vessel until he has made every reasonable endeavor to obtain supplies, repairs, or money upon his own personal credit or that of the owners. (*r*) It is not until all other means of obtaining necessities fail, that he has authority to hypothecate the ship and to give maritime interest, which is in effect defeating the object of the adventure, and [* 642] transferring to the creditor much of * the profits of the voyage. If the master at a foreign port is able to communicate speedily with the owners, it is his duty to do so before he orders repairs or supplies; (*s*) and where practicable he must do so before he can create a lien on the vessel or cargo. (*t*) It is no excuse for not communicating with the owner under such

(*m*) *Stainbank v. Fenning*, 11 C. B. 51; 20 L. J. C. P. 226.

(*n*) *The Royal Arch*, 1 Swabey, 281; *The Indomitable*, 5 Jur. n. s. 632; *The Ida*, L. R. 3 Ad. 542; 41 L. J. Adm. 85.

(*o*) *Joy v. Kent*, Hardr. 418.

(*p*) *Thomson v. Royal Exchange Ass. Soc.*, 1 M. & S. 30; *Broomfield v. Southern Insurance Co.*, L. R. 5 Ex. 192.

(*q*) *The Karnak*, L. R. 2 A. & E. 289; ib. 2 P. C. 505; 37 L. J. Adm. 41; 38 ib. 57.

(*r*) *Heathorne v. Darling*, 1 Moore, P. C. C. 5; *The Nelson*, 1 Hag. 176; *La Ysabel*, 1 Dod. 273; *The Orelia*, 3 Hag. 84; *The Dunvegan Castle*, ib. 331.

(*s*) *Wallace v. Fieldin*, 7 Moore, P. C. C. 398; *Duranty v. Hart*, 2 Moore, P. C. n. s. 289; *The Olivier*, 1 Lush, 484; *The Hamburg*, 32 L. J. Adm. 161.

(*t*) *Kleinwort & Co. v. The Cassa Maritima of Genoa*, 2 Ap. Cas. 156, P. C.

circumstances that he is insolvent, unless he has been judicially declared so, and the ownership of the vessel has vested in his trustee in bankruptcy, in which case notice should be given to the trustee. (u) If the ship-master borrows money for his own purposes or for those of the consignee of the cargo, (x) as distinguished from those of the ship-owners, his contract will fail to create a lien upon the vessel. (y) Repairs executed or advances made on personal credit cannot afterward be converted into a bottomry transaction. There may, however, be cases of extreme urgency, where the master is dead and the merchant advances money, intending to require a bottomry bond from the beginning, and gives the owners the earliest possible notice of his intention, in which the bond might be upheld, though no agreement for it was originally made; but they are cases of exception to the general principle. The master ought, in general, to be distinctly apprised of the intention of a lender of the money to require a bottomry bond, that he may have time and opportunity to exercise his discretion as to entering into the contract, or to try at least to take other means to avoid the necessity, to advise with the owners of the ship and cargo if it be practicable, or, if not, at least to consult with persons on the spot.

But although when a ship-master orders repairs and supplies on credit given to him personally, those who gave the credit cannot take a bottomry bond, yet a merchant, a stranger to the transaction, or even an agent, if he has not made himself responsible, may advance money on bottomry to liquidate those demands: (z) and a bottomry bond may, it seems, be given at the same time with, and as a collateral security for, bills of exchange for repairs and necessities for the voyage, in this sense that, if the bills of exchange are honored, the bottomry bond is discharged. (a)

If, after a bond hypothecating the vessel has been entered into, the vessel becomes damaged, and puts into a foreign port for shelter, it cannot be sold by the master so as to extinguish

(u) *The Panama*, L. R. 3 P. C. 199; *gusta*, 1 Dods. 283; *The Laurel*, 33 L. J. Adm. 37.

(x) *The Edmond*, 30 L. J. Adm. 128.

(y) *The Reliance*, 3 Hag. 66.

(z) *The Wave*, 15 Jur. 518; *The Au-*

J. Adm. 17.

(a) *Stainbank v. Shepard*, 22 L. J.

Ex. 341; *The Emancipation*, 1 Wm.

Rob. 124.

[* 643] the maritime * lien ; and as the doctrine of constructive total loss does not apply to bottomry bonds, if the ship is found unseaworthy, and sold, the bondholder will be entitled to a first charge on the proceeds. (b) In the case of British ships, the certificate of registry is (see Add. on Torts (5th ed., by Cave), pp. 490—492) the great evidence of title ; and all bottomry bonds and hypothecations ought to be, and generally are, indorsed upon it ; and no man should purchase a British ship, even in a foreign port, without seeing the certificate. It is the duty of purchasers of British ships in foreign ports to make strict inquiries and be especially careful to guard themselves against liens which adhere to the ship ; and they cannot be safe in cases of sale by the master, unless recourse is had to a court of justice, and a decree is obtained for the sale of the vessel. (c) A British consul in a foreign port is entitled, under certain circumstances of urgent necessity, when the master is dead, to hypothecate a vessel and cargo through the medium of a bottomry bond. (d)

Lien on Vessels causing Damage. — The owner of a vessel damaged at sea by collision with another vessel has a lien upon the vessel causing the damage, which may be enforced in the Court of Admiralty by a proceeding *in rem* against the vessel, so that, if the vessel causing the damage is carried to a distant port, and sold to a *bona fide* purchaser without notice of the lien, the vessel may nevertheless be attached in the hands of such *bona fide* purchaser and sold to satisfy such damage. But this lien may be lost by negligence or delay, where the rights of third parties are thereby compromised. (e) A maritime lien is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding *in rem*, relates back to the period when it first attached. (f) But no bottomry bondholder or mortgagee can be a competitor with a successful suitor in a cause of damage in the Admiralty Court. The lien of the latter will prevail over both the mortgage and the bot-

(b) *The Great Pacific*, L. R. 2 P. C. 516 ; 38 L. J. Adm. 45.

(c) *The Catharine*, 15 Jur. 231.

(d) *The Cynthia*, 16 Jur. 748.

(e) *The Europa*, 2 Moore, P. C. n. s. 1.

(f) *Harmer v. Bell*, 7 Moore, P. C. 285.

tomry bond, unless the bottomry bond has been granted after the damage has been done.

Priority of Maritime Liens. — Where there were two bottomry bonds attaching on the vessel causing the damage, one entered into before, and the other after, the collision, it was held that the lien for the damage must be preferred to the lien of the first bondholder, but that it did not extend to the increased value of the vessel resulting from repairs effected at the cost of the second bondholder. (g) Where several bottomry bonds have been given * by the master at different periods during [* 644] the voyage, those of the latest date have the priority of payment, on the supposition that the last bond operates for the protection of the prior interests. (h) A bottomry bond also executed under the pressure of necessity at a foreign port will supersede a previous mortgage of the ship. (i)

Hypothecation of Cargoes and Merchandise. — The master of a ship may, under the pressure of extreme necessity, and where he is unable to communicate with the owner, (k) hypothecate the cargo as well as the ship, to enable him to raise funds to prosecute the voyage and deliver the goods at the port of destination. He is clothed with an implied authority to take whatever steps ought to be taken to protect them from impending destruction. (l) But he can do no more than the owners themselves could if actually present; and he cannot sell against their will. (m) He may create and continue a charge upon the cargo in favor of the lender of the money so long as such cargo remains in his possession; but he has no power to hypothecate it so as to enable the creditor to follow it after it has been sold or transferred. (n) Where a ship, freight, and cargo were hypothecated at a foreign port by one bottomry bond for necessary repairs, and the plaintiff's goods formed part of the cargo so hypothecated, and the ship and freight realized less than the sum borrowed, and the goods became liable for the deficiency.

(g) *The Aline*, 1 W. Rob. 120.

(l) *The Gratitude*, 3 Rob. 240.

(h) *The Betsy*, 1 Dods. 289; *The Rhadamanthe*, ib. 201.

(m) *Australasian Steam Navigation Co. v. Morse*, L. R. 4 P. C. 222; *Acatoe v. Burns*, 3 Ex. D. 282, C. A.

(i) *The Duke of Bedford*, 2 Hag. 294.

(n) *Busk v. Fearon*, 4 East, 319.

(k) *Australasian Steam Navigation Co. v. Morse*, L. R. 4 P. C. 222.

and the plaintiff was compelled to pay it to release his goods, it was held that he might maintain an action against the shipowner for the recovery of the money he had been obliged to pay to release his cargo; also that the shipowner could not abandon the ship and freight, and refuse to ratify the act of the master, because the costs and expenses exceeded the value of the ship, when repaired, and the freight; and that "a merchant advancing money on bottomry in a foreign port, though bound to show a reasonable case of unprovided necessity for the advance, from the want of repair, or otherwise, is not bound to inquire into the expediency of incurring the expense of these repairs with reference to the interest of the owner." (o) By the French law, on the contrary, the shipowner in a similar case may abandon the ship and freight, and, if he does so, will not be liable to the shipper for money paid to release the cargo. (p)

Illegal Pledge. — By the Mercantile Shipping Act, [* 645] 1854, sect. 50, * any pledge of the certificate of registry of a ship is made illegal and void; and, therefore, if a sole owner and captain pledges the certificate for good consideration, he may nevertheless re-demand the document for the purposes of navigation, and may maintain an action against the pledgee if it is not delivered up on request. (q)

Mortgages of Fixtures may be made through the medium of any instrument of conveyance in writing, and need not be by deed. (r) If certain fixtures are enumerated in a mortgage-deed, and there is then a clause embracing all fixtures upon the premises, fixtures of all kinds will pass to the mortgagee. (s) If the mortgagor makes default in payment of the mortgage-debt at the time appointed, the mortgagee may proceed to sell without taking proceedings to foreclose, and may apply the proceeds of the sale in liquidation of the mortgage-debt, interest, and costs. (t) But he will be ordered to account for and pay over any surplus that

(o) *Duncan v. Benson*, 1 Exch. 537; Add. on Torts (5th ed., by Cave), p. Benson v. Duncan, 3 ib. 644. 491.

(p) *Lloyd v. Guibert*, 6 B. & S. 100; (r) *Thompson v. Pettit*, 10 Q. B. L. R. 1 Q. B. 115; 33 L. J. Q. B. 241; 101.

35 L. J. Q. B. 74. See *Greer v. Poole*, (s) *Haley v. Hammersley*, 30 L. J. 5 Q. B. D. 272. Ch. 771.

(q) *Wiley v. Crawford*, 1 B. & S. (t) *Tucker v. Wilson*, 1 P. Wms. 253; 30 L. J. Q. B. 319. See also 261; *Lockwood v. Ewer*, 2 Atk. 303.

may remain. (u) If he does not think fit to sell he can obtain a decree of foreclosure, and bar the equity of redemption, and make the property his own. (x)

Right to Fixtures as between Mortgagor and Mortgagee.¹—A mortgagor in possession may become tenant at will to the mortgagee, or tenant at sufferance; but he is not in general tenant for any term. The cases, therefore, respecting the right to disannex and remove fixtures as between landlord and tenant, have no application to the case of mortgagor and mortgagee. A mortgage made by the owner of the inheritance will in general pass all the fixtures thereon, though they are not named in the deed, and although they are trade fixtures which have been annexed to the freehold for the more convenient using of them and not to improve the inheritance, and are capable of being removed without any appreciable damage to the freehold. (y) They pass to the mortgagee as part and parcel of the inheritance; and the mortgagor does not, by becoming tenant to the mortgagee, acquire any right to remove any portion of them, although they would be removable in ordinary cases as between landlord and tenant. (z) Trade fixtures affixed to mortgaged freehold premises after the mortgage by the mortgagor and his partner occupying the premises for the purpose of their trade pass to the mortgagee. (a)

¹ Ewell, *Fixt.* 271-287; Tyler, *Fixt.* c. 41-46; Jones, *Mortg.* c. 40; Thomas, *Mortg.* 46; Mart. Conv. 382; U. S. Dig. tit. *Mortgages*, sects. 443, 934; *ib.* tit. *Fixtures*; U. S. Ann. Dig. 1870-78, tit. *Mortgages*, I.; *ib.* 1879, &c. tit. *Fixtures*, II.; *Southbridge Sav. Bank v. Stevens Tool Co.*, 130 Mass. 547; *Smith Paper Co. v. Servin*, 130 Mass. 511.

(u) *Harrison v. Hart*, 1 Com. 393. 115; 29 L. J. C. P. 97; *Mather v. Fraser*, 2 Kay & J. 536; 25 L. J. Ch. 361;
 (x) *Wayne v. Hanham*, 9 Hare, 62. 25 L. J. Ch. 361;
 (y) *Climie v. Wood*, L. R. 3 Ex. 257; *Haley v. Hammersley*, 30 L. J. Ch. 771.
ib. 4 Ex. 328; 37 L. J. Ex. 158; 38 *ib.* (a) *Cotton, Ex parte*, 2 M. D. & D.
 223; *Holland v. Hodgson*, L. R. 7 C. P. 725; *Cullwick v. Swindell*, L. R. 3 Eq.
 328; 41 L. J. C. P. 146. 249; 36 L. J. Ch. 173; *Longbottom v.*
 (z) *Walmaley v. Milne*, 7 C. B. N. S. Berry, L. R. 5 Q. B. 123.

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* SECTION IV.

MORTGAGE, ETC., OF INCORPOREALS.

Mortgages of Shares and Stock¹ in a public company may be effected by the execution by the mortgagor of the ordinary deed of transfer conveying the shares to the mortgagee in consideration of the payment of the mortgage-money, as in the case of an absolute sale, taking at the same time a separate deed from the mortgagee, admitting that the transfer, though absolute on the face of it, was in reality made by way of mortgage, and undertaking to re-transfer the shares by a given day on repayment by the transferrer of the mortgage money. If the transfer is on the face of it made conditional by way of mortgage, and not in the ordinary form of transfer given by the statute incorporating the company, the company will refuse to register it, as they cannot, as we have seen, place on the register transfers complicated with trusts and conditions. (a) Foreclosure, and not sale, is the remedy of an equitable mortgagee of a share in a mining partnership. (b)

If a person transfers his shares in a company by way of mortgage, and the mortgagee, as registered owner, becomes liable for calls or other payments, he cannot compel his mortgagor to indemnify him, unless he comes to redeem the shares. (c)

Mortgages of Stock and Shares void by Reason of Reputed Ownership. — If money is advanced on the security of a transfer of shares made by way of mortgage, and the transfer is not registered in the register of shareholders of the company, so that the mortgagor still appears on the register as the holder of the

¹ Biddle, Stockb. 387; Dos Passos, Stockb. 658; Hubbell v. Drexel, 21 Am. L. Reg. 452, and note by A. Biddle, ib. 454; Zimpleman v. Veeder, 98 Ill. 613.

Bank stock may be mortgaged like other personal property. Manns v. Brookville Bank, 73 Ind. 243.

(a) *Ante*, p. * 537, Sale of Incorporals; Reg. v. General Cemetery Co., 6 Ell. & Bl. 415; 25 L. J. Q. B. 342.

(b) Redmayne v. Forster, L. R. 2 Eq. 467; 35 L. J. Ch. 847.

(c) Smith's Man. of Eq., 11th ed. p. 339.

shares, the shares will be in his order and disposition, and, in case of his bankruptcy, will pass to his trustee, provided the legal power to transfer the shares still continued in the mortgagor; but if the transfer cannot be made without the production of the mortgagor's certificates of proprietorship, and these certificates have been placed in the hands of the mortgagee so as to give the latter an equitable lien upon them, then, as the mortgagor has no power of transfer, the shares are not in his order and disposition. (d)

Lien upon Shares and Stock¹ — Certificates of proprietorship of shares frequently have a notice at the foot of them warning the *shareholder that no transfer of his shares [* 647] can be effected without the production of that certificate; and the companies refuse to register a transfer-deed unless the certificates of proprietorship of the transferror have previously been deposited at the transfer office. If, therefore, a shareholder borrows money on the security of shares, and deposits his certificates in the hands of the lender, accompanied by an agreement in writing to transfer the shares to the lender or to his nominee in case of the non-payment of the money by the time appointed, there will be a good charge upon the shares; (e) but notice of the deposit of the certificates should be given to the company to prevent the shareholder from obtaining fresh certificates by perjury or fraud, and to do away with the inference of reputed ownership in case of the bankruptcy of the depositor in whose name the shares are registered, and so prevent the title to the shares from vesting in his trustee.

The fact that the company is not bound to take notice of any trust will not render a notice to them of the deposit of the certificates by way of security for a loan nugatory, and will not prevent a deposit of the certificates of proprietorship by way of

¹ Upon collateral securities, see article by C. B. Elliott, 14 Cent. L. J. 462; *Cherry v. Frost*, 21 Am. L. Reg. 57; and note on Character of a bill of sale of shares, accompanied by power to transfer, while the shares remain untransferred, by F. A. Lewis, ib. 63; note on the Diligence which holder of collateral security must exercise for its collection, by A. C. Freeman, 34 Am. Dec. 451; article on Collateral securities, by L. A. Jones, 14 Am. L. Rev. 97; ib. 465, 639.

(d) *Harrison, Ex parte*, 3 Deac. 196. 503; *Littledale, Ex parte*, 6 De G. M. & G. 730; *Stewart, Ex parte*, 34 L. J. Ch. 6.

security for a loan from constituting a valid charge upon the shares. (f)

Where a sister advanced her brother £1800 on the security of a deposit of mining shares belonging to the brother, and received the certificates of the shares, together with an undertaking, signed by the brother, to complete the transfer of the shares to the petitioner when required, and placed the certificates and the undertaking in an enclosure which she sealed with her seal, and then deposited it in an iron safe belonging to her brother for greater security, it was held that the certificates were not in his possession, order, or disposition at all. He had certainly the custody of the packet, but could not lawfully have broken the seal to get at the contents. (g)

(f) *Stewart, Ex parte, supra, explaining and qualifying Boulton, Ex parte, 1 De G. & J. 763.* (g) *Ex parte Richardson, 3 Deac.*

* CHAPTER IV.

[* 648]

OF CONTRACTS OF INDEMNITY.

SECTION I.

PRINCIPAL AND SURETY.

Of the Contract of Suretyship.¹ — The contract or undertaking of a surety is a contract by one person to be answerable for the

¹ As to the contract of suretyship or guaranty generally, see Baylies, Sur. & Guar. c. 1, 2, 3; Brandt, Sur. & Guar. c. 1, 3; 2 Pars. Contr. 1; Story, Contr. c. 44-49; Jones, R. R. Sec. c. 10; 2 Dan. Neg. Inst. c. 41; McAdam, Land. & Ten. (2d ed.) c. 18. Article on Guaranties of payment and collection, 17 Alb. L. J. 366; U. S. Dig. tit. *Principal and Surety*; ib. tit. *Guaranty*.

Rep. N. Y. Civ. Code, sect. 1558, note, states the distinction thus: "The distinction between a surety and a mere guarantor is, that the former enters into the contract primarily for the benefit of the debtor, while with the latter the benefit of the principal debtor is no material part of the inducement to him to contract." See, also, 1 Abb. L. Dict. *Guaranty*; 2 Abb. L. Dict. *Surety*; also, Wharton's and Burrill's L. Dicts., and note to *Birdsall v. Heacock*, by G. W. Reed, 13 Am. L. Reg. n. s. 757.

Recent cases are: Necessity that seller of goods should give notice to guarantor that he accepts the guaranty, in order to render it obligatory. *Crittenden v. Fiske*, 46 Mich. 70; *Taylor v. Schouse*, 73 Mo. 361; *Wills v. Ross*, 77 Ind. 1; *Davis v. Will*, 104 U. S. 159; *Wilcox v. Draper*, 12 Neb. 138. See, also, *Wade, Notice*, 165.

A railroad corporation or manufacturing company (in Massachusetts) cannot give a guaranty of payment of expenses of a proposed musical festival. *Davis v. Old Colony R. R. Co.*, 131 Mass. 258. And see *Jones, R. R. Sec. c. 350-356*.

Construction and effect of various guaranties, and reception of parol evidence to explain or vary. *Davis Sewing-Machine Co. v. Stone*, 131 Mass. 384; *Baldwin v. Dow*, 130 Mass. 416; *Young v. Brown*, 53 Wis. 333.

Ratification of guaranty given by one partner in the name of the firm without authority. *Clark v. Hyman*, 55 Iowa, 14.

That a surety's contract is strictly construed, and he is deemed liable only for what is expressed or plainly implied, see *City Council v. Hughes*, 65 Ala. 201.

There has been much dispute whether, when a surety, after executing a bond, intrusts it to the principal to obtain signatures of other sureties, upon express agreement that it shall not be delivered until such other signatures have been affixed, such agreement protects the surety, and some well-considered decisions are in the affirmative (*United States v. Hammond*, 4 Biss. 283; *Pawling v. United States*,

payment of some debt, or the performance of some act or duty, in case of the failure of another person, who is himself primarily responsible for the payment of such debt, or the performance of the act or duty. To the contract and engagement of suretyship it is essential that there be a principal or third party primarily liable; for there can be no accessory without a principal. (a) If, therefore, no contract has been entered into with the third party on whose account the covenantor or promisor professes to act as surety, no liability attaches to the latter, as he cannot be made primarily liable upon a contract by which he has expressly imposed upon himself only a secondary liability as surety. From the terms and language of some contracts, a doubt frequently arises as to whether the contract is the contract of a surety coming in aid only of a principal debtor or contractor, and undertaking a secondary liability upon the default of the principal, or whether it is the contract of a principal and sole contracting party stipulating for some benefit or advantage for a third party, who is not bound by the contract, and on whom no liability whatever attaches. (b) When a man wishing to procure credit for his friend writes a letter to a shopkeeper, requesting him to supply such friend with goods, saying, "If *he* does not pay you, I will," the undertaking is the undertaking of a surety. If he

4 Cranch, 219; *Guild v. Thomas*, 54 Ala. 414; *State v. Sandusky*, 46 Mo. 377; *Ayer v. Milroy*, 53 Mo. 516; *State Bank v. Evans*, 15 N. J. L. 155; *Fletcher v. Austin*, 11 Vt. 447; *Preston v. Hull*, 23 Gratt. 600; but the weight of American authority is said to be that the surety is bound by a delivery, though made in violation of the condition, if the instrument as delivered was complete, and the obligee took it without notice; otherwise if the paper as delivered indicated that other persons are to become signers before delivery, or there were other facts to put the obligee on his guard about accepting (*Dair v. United States*, 16 Wall. 1; *Tidball v. Halley*, 48 Cal. 610; *Clark v. Bryce*, 64 Ga. 486; *State v. Crisman*, 2 Ind. 126; *Deardorff v. Foresman*, 24 Ind. 481; *Blackwell v. State*, 26 Ind. 204; *Webb v. Baird*, 27 Ind. 368; *State v. Pepper*, 31 Ind. 76; *Wild Cat Branch v. Ball*, 45 Ind. 213; *Millett v. Parker*, 2 Met. (Ky.) 608; *Smith v. Moberly*, 10 B. Mon. 266; *Brown v. Kent County Probate Ct.*, 42 Mich. 501; *State v. Potter*, 63 Mo. 212; *Fales v. Filley*, 2 Mo. App. 345; *Cutter v. Roberts*, 7 Neb. 4; *Russell v. Freer*, 56 N. Y. 67; *State v. Lewis*, 78 N. C. 138; *Loew v. Stocker*, 68 Pa. St. 226; *Dixon v. Dixon*, 31 Vt. 450; *Passumpsic Bank v. Goss*, ib. 315; *Washington Probate Ct. v. St. Clair*, 52 Vt. 24; *Nash v. Fugate*, 24 Gratt. 202; *Penn. v. Hamlett*, 27 ib. 337; *Miller v. Fletcher*, ib. 403).

(a) Pothier (*Ob.*), No. 446-449; *Inst. lib. 3, tit. 21, sect. 5.*

(b) *Ante*, p. *167; *Spark v. Heslop*, 28 L. J. Q. B. 197; 1 El. & El. 563.

says, "I will be answerable," or "I will see you paid," the expressions are equivocal; and then we ought to look at the surrounding circumstances to see what the contract really was. (c) If upon examination of those * circumstances [* 649] it should appear that the party to whom the goods have been furnished has been treated as the debtor and principal contracting party, — as, for example, if the credit has been given to him in the tradesman's books, and he has been applied to for payment, — then the promisor can only be made liable as a surety after default on the part of such debtor and principal contracting party. If the promisor is himself interested in the subject-matter of the promise or the transaction to which it relates, he will stand in the position of a principal contracting party. (d) But where B verbally promised that if M would supply C with iron, and take C's acceptances, he would discount them, it was held that this was a promise to answer for the default of another, and that M could not recover against B on his refusing to discount the acceptances. (e)²¹

Authentication of Guarantees.¹ — According to the Roman civil law, the engagement of a surety could only be contracted by STIPULATION. By our own common law it might be contracted orally; but the legislature has thought fit to require the engagement to be authenticated by writing, and it has been enacted, as previously mentioned, by the fourth section of the statute of frauds (*ante*, pp. * 166—* 169), that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the AGREEMENT upon which such action shall be brought, or some memorandum or note thereof, shall be in

¹ As to the statutory requirements regarding the authentication of guaranties, see Baylies, Sur. & Guar. c. 5; Brandt, Sur. & Guar. c. 2; 3 Pars. Contr. 19; Story, Contr. c. 45; Browne, Stat. Fr. (4th ed.) c. 10; also *ante*, p. * 166, Am. note 1; Barry v. Cavanagh, 130 Mass. 436; Wills v. Ross, 77 Ind. 1; Clopper v. Poland, 12 Neb. 69. New consideration: when needful, and what consideration is sufficient, see Anderson v. Norvill, 10 Ill. App. 240.

(c) Bayley, B., Simpson v. Penton, 2 Cr. & M. 433.

(e) Mallet v. Bateman, L. R. 1 C. P. 163; 35 L. J. C. P. 40.

(d) Fitzgerald v. Dressler, 5 Jur. N. S. 598; 29 L. J. C. P. 113.

²¹ See Appendix, Vol. III.

writing and signed by the party to be charged therewith, or some other person by him lawfully authorized. Formerly, if the guarantee or undertaking was made by simple contract or by writing not under seal, the cause or consideration for the promise, as well as the promise itself, must have been disclosed upon the face of the writing; but by the 19 & 20 Vict. c. 97, sect. 3, no special promise made by any person to answer for the debt, default, or miscarriage of another person, being in writing and signed by the person to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document. But parol evidence is not admissible to explain the promise, and therefore the whole promise must be in writing, or

the memorandum will be insufficient. (*f*) If the writing is so vague * and uncertain that the nature and extent of the undertaking and liability cannot be made out from the terms of the instrument, it will not constitute a sufficient memorandum of the promise. (*g*) If, therefore, the name of the principal intended to be guaranteed is left out or left in blank, there is no sufficient memorandum of the contract. (*h*)

The statute of frauds, as we have seen (*ante*, p. * 166), does not apply to the case where the party giving the guarantee is himself liable to the demand which he is purporting to guarantee. The debt must be exclusively the debt, default, or miscarriage of another, to bring it within the statute. (*i*)

Primary and Secondary Liabilities.—When money is advanced or goods are supplied to a principal debtor on the security of a joint and several covenant, or a joint and several promissory note, executed by the principal debtor and his sureties, for the repayment of the money advanced or the due pay-

(*f*) *Holmes v. Mitchell*, 7 C. B. N. S. 361; 28 L. J. C. P. 301.

(*g*) *Holmes v. Mitchell*, *supra*.

(*h*) *Williams v. Lake*, 2 El. & El. 349; 29 L. J. Q. B. 1.

(*i*) *Orrell v. Coppock*, 26 L. J. Ch. 269; *ante*, pp. * 166—* 169.

ment of the price of the goods, all the co-covenantors or co-promisors are primarily liable on the face of the instrument, and are bound to see that the money is paid on the day appointed for payment, so that if default is made they may be at once sued upon the instrument. Formerly, when two or more persons signed a joint and several promissory note as principals, it was not allowed at common law to modify the effect of the contract by showing that one of them signed only as surety for the other; but now the fact may be pleaded and given in evidence for the purpose of giving the party so signing the equitable rights of a surety, but not for the purpose of establishing a different contract from that evidenced by the writing, such as that a party who has contracted a primary obligation on the face of the contract was not intended to be primarily liable, but had agreed only to be secondarily liable after the default of another joint contractor. (*k*)

Of the Consideration when stated on the Face of a Guarantee.¹—We have already seen that a bygone transaction cannot be made a good consideration for a promise (*ante*, p. * 8); but if there is a valid consideration in point of fact, the mere statement of it in the past tense on the face of a guarantee will not invalidate the contract. The consideration, if disclosed, need not be expressed in words of form, or with technical accuracy. (*l*) The contract must be interpreted in connection with surrounding *circumstances, in order to [* 651] ascertain whether it was intended to apply to past or to future transactions; and in case of doubt and ambiguity it would seem that parol evidence is admissible to show that the parties meant not a past, but a future transaction; (*m*) and the courts

¹ Baylies, Sur. & Guar. c. 4; Brandt, Sur. & Guar. sects. 6-9, 30, 68-74; U. S. Dig. tit. *Guaranty*, sect. 285; 2 Pars. Contr. 6; 2 Story, Contr. sect. 1110; Anderson v. Norvill, 10 Ill. App. 240.

(*k*) Pooley v. Harradine, 7 Ell. & Bl. 431; Greenough v. M'Clelland, 2 Ell. & Bl. 424; 30 L. J. Q. B. 15; Manley v. Boycott, 2 Ell. & Bl. 46; 22 L. J. Q. B. 265; Mut. Loan Fund, &c. v. Sudlow, 5 C. B. n. s. 453; 28 L. J. C. P. 108; Lawrence v. Walsley, 12 C. B. n. s. 809; 31 L. J. C. P. 143. (*l*) Pace v. Marsh, 8 Moore, 59; Boehm v. Campbell, 3 Moore, 15; Oldershaw v. King, 2 H. & N. 519; 27 L. J. Ex. 120. (*m*) Hoad v. Grace, 7 H. & N. 794; 31 L. J. Ex. 98.

will lean in favor of such a construction as will uphold and maintain the contract rather than render it nugatory and of no effect. (*n*) Thus where the defendant gave to the plaintiffs the following guarantee: "As Mr. D. informs me you require some person as guarantee for goods supplied to him by you in his business, I have no objection to act as such for payment of your account," it was held that the expression "for goods supplied" did not necessarily import a past transaction, and ought to be read "for goods to be supplied." (*o*) If the consideration was a future valid consideration and not a past transaction, the guarantee will be upheld as a valid instrument. (*p*) But if there are no future advances, and the instrument, construed in connection with surrounding circumstances, does not show a future consideration, but refers altogether to a past transaction, it is invalid. (*q*) If there is any consideration for a guarantee, the court will not take notice of its inadequacy. (*r*) An indorsement on a contract of a guarantee or undertaking for the faithful performance of the contract by one of the contracting parties may be read in connection with the contract, in order to ascertain and establish the consideration. (*s*)

Proposals and Offers to Guarantee not amounting to a Concluded Contract. — Care must be taken in all cases to mark the distinction between a consummate and perfect guarantee, and a mere proposal, or offer, or tender of a guarantee, which must be accepted, and the acceptance notified to the maker, and his final assent to the engagement be obtained, ere it can become a perfect and concluded contract. Where the defendant wrote a letter to the plaintiffs to the following effect: "Gentlemen, — As I understand, Messrs. Anderson & Co. have given you an order for rigging, &c., which will amount to about £4000: I can assure you, from what I know of their honor and probity, you will be perfectly safe in crediting them to that amount; indeed

(*n*) *Broom v. Batchelor*, 1 H. & N. L. J. C. P. 154; 10 C. B. 773; *Brooks v. Haigh*, 10 Ad. & E. 334.

(*o*) *Hoad v. Grace*, 7 H. & N. 494; 31 L. J. Ex. 98. (*q*) *Bell v. Welch*, 9 C. B. 168; 19 L. J. C. P. 184; *Allnutt v. Ashenden*, 6

(*p*) *Bainbridge v. Wade*, 16 Q. B. 99; 20 L. J. Q. B. 7; *Steele v. Hoe*, 19 L. J. Ex. 265; 6 H. & N. 728.

ib. 89; *Edwards v. Jevons*, ib. C. P. 50; 8 C. B. 436; *Colbourn v. Dawson*, 20 L. J. Ex. 265; 6 H. & N. 728. (*r*) *Dutchman v. Tooth*, 7 Sc. 710. (*s*) *Coldham v. Showler*, 2 C. B. 312.

I have no objection to guarantee you against any loss from giving them this credit;" and this letter was given by the defendant to Anderson & Co., who handed it over to the plaintiffs, and the latter thereupon furnished * the rigging and [* 652] other articles, and, being unable to procure payment from Anderson & Co., brought an action against the defendant, it was held that the letter did not import a perfect and conclusive guarantee, but only a proposition tending to a guarantee; that it was a mere overture or offer; and that if the plaintiffs had accepted it and intended to treat it as a guarantee, they ought to have given notice to the defendant. (t) So where an action was brought upon a letter addressed to the plaintiffs in the following terms: "Gentlemen,—Mr. France informs me that you are about publishing an arithmetic for him and another person; and I have no objection to being answerable as far as £50. For my reference, apply to Messrs. Brooke & Co. of this place;" which letter had been signed by the defendant and given to Mr. Brooke and forwarded by him to the plaintiffs, who proceeded with the publication without ever communicating with the defendant, it was held that the transaction "could not not be tortured into a consummate and perfect contract;" that it was a mere offer or proposal requiring an answer; and that as the plaintiffs had not communicated their acceptance of it to the defendant before they proceeded to act upon it, they could not treat it as an absolute and conclusive engagement, capable of sustaining an action. (u)

If references are required from, and given by, an intended surety, and the creditor means to dispense with the references and act upon the guarantee without them, he is bound to give notice to the surety of the intended renunciation before he acts upon the guarantee. (x)

Conditions precedent.—When the liability of the surety attaches only on the happening of some precedent act or event, it must be fully established that the event has happened. (y)

(t) *M'Iver v. Richardson*, 1 M. & S. 557.

(u) *Mozley v. Tinkler*, 1 C. M. & R. 692.

(x) *Morten v. Marshall*, 2 H. & C. 305; 33 L. J. Ex. 54.

(y) *Moor v. Roberts*, 3 C. B. n. s. 841.

Bonds to secure Faithful Services.¹—If the surety has bound himself by a penal obligation under seal for the performance of some contract, act, or duty by his principal, and the time for which the surety is to be bound is marked out in the recitals or condition, it cannot afterward be extended by any general words. If the recital sets forth the appointment of the party on whose behalf the surety consents to become bound, to some office or employment, and the condition of the bond is for the good conduct and faithful service of the party in such office or employment, the liability of the surety will be co-extensive with the duration of the office; if the office is an annual office, the [* 653] liability will not extend * beyond the current year of office; (z) if it is a fixed and permanent employment for the life of such party, the liability of the surety will continue during the whole of the life of the latter; if, on the other hand, the duration is uncertain,—as, for instance, if it is holden at the will of the employer,—the liability will be as indefinite and uncertain as the time of the employment. (a) Moreover, if a bond is given to secure the faithful services of the principal in one office or employment at a specified salary, it will not extend to a different office or employment at the same salary, or to the same office at a different and reduced salary; (b) and a surety who becomes responsible for the good conduct of his principal as a clerk, will not be bound for him if he is afterward employed as “a manager.” (c) But there must be a substantial change in the office or employment, or the surety will not get rid of his liability. (d) In an action upon a bond to secure the faithful service of a deputy-postmaster, it appeared by the recitals of the bond that the Postmaster-General had deputed Jenkins to be deputy-postmaster “for the term of six months following;” and the condition was that Jenkins should, during all the time he continued deputy-

¹ See *post*, p. * 655, and American note.

(z) *Mayor, &c. of Cambridge v. Dennis*, 27 L. J. Q. B. 474.

(a) *Mayor of Dartmouth v. Silly*, 7 Ell. & Bl. 97; 26 L. J. Q. B. 90.

(b) *North-West Ry. Co. v. Whinray*, 10 Exch. 77; 23 L. J. Ex. 261; *Hol-*

land v. Lea, 9 Exch. 430; *Frank v. Edwards*, 8 Exch. 220; 22 L. J. Ex. 42.

(c) *Anderson v. Thornton*, 3 Q. B. 276; *Whicher v. Hall*, 5 B. & C. 276.

(d) *Portsea Isl. Un. (Guard.) v. Whillier*, 29 L. J. Q. B. 150; 2 El. & El. 755.

postmaster, faithfully and diligently perform and execute the duties of the office; and it was held that the liability of the surety was restricted to the six months specified in the recitals. (e) And although the recital of a bond setting forth the appointment of the principal to a certain office or employment does not state the nature or duration of the office, or in any way limit the period of the service for the honest and faithful performance of which the surety binds himself, yet, if the office is in point of fact an annual office, and there is a fresh deputation and appointment each year, the surety is only answerable for the execution of the duty for the current year. (f)

Extent and Duration of the Liability of the Surety.¹—If the surety by express words plainly manifests an intention to be bound for the faithful service and good conduct of the party, not only for the current year of office, but for all succeeding years under any fresh appointment, the obligation will continue in force as long as the obligee may think fit to continue the * employment. (g) Thus where a bond reciting the [* 654] appointment of the principal to an office was conditioned for the due fulfilment by him of the duties thereof “during such time as he shall continue in the said office, whether by virtue of his said appointment or of any reappointment thereto,” it was held that the obligation was not confined to the current year of office, but extended to all subsequent years during which the party was continually reappointed. (h) And the surety may, by the terms of an express contract under seal, render himself responsible for past, present, and future receipts and payments, and preceding debts and defaults, as well as those that are to come. (i) And if the duration of the office or employment to which the

¹ Brandt, Sur. & Guar. c. 6; Baylies, Sur. & Guar. 134, 144; U. S. Dig. tit. *Guaranty*, sect. 474.

(e) *Arlington v. Meyricke*, 2 Wms. Moore, 102; *Lond. Ass. Co. v. Bold*, 6 Saund. 411 s; *Stoughton v. Day*, Al. Q. B. 526; *Cambridge, Mayor, &c. v. 10; Sty. 18; Bamford v. Iles*, 3 Exch. Dennis, 27 L. J. Q. B. 475.
380; *Liv. Water Co. v. Atkinson*, 6 (g) *Berwick, Mayor of, v. Oswald*, 3 Ell. & Bl. 653; *Oswald v. Berwick, &c.*, East, 512. 5 H. L. C. 856.

(f) *Hassell v. Long*, 2 M. & S. 363; 5 H. L. C. 856.
Peppin v. Cooper, 2 B. & Ald. 431; (h) *Augero v. Keen*, 1 M. & W. 390.
Wardens of St. Saviour's v. Bostock, 2 (i) *Saunders v. Taylor*, 9 B. & C. 35,
B. & P. N. R. 180; *Leadley v. Evans*, 9 41.

party is stated to have been appointed is indefinite and uncertain ; if, for example, it is held or continues *durante bene placito*, and there is nothing in the language of the recital or of the condition directly or indirectly limiting the period of liability, the extent and duration of the obligation of the surety are then as indefinite and uncertain as the period of employment, and will continue as long as the employment lasts, though it should be for the whole life of the principal or party employed. (*k*)

Release of the Surety. — The civil and Continental laws enable the surety, when no time at all is marked out by the contract for the termination of his liability, to release himself by process of law after a reasonable period from the time of the making of the contract. (*l*) In our own law the surety has no such means of discharging himself from the liability he has voluntarily undertaken ; (*m*) and the courts, therefore, in all cases construe doubtful contracts of suretyship (when they are under seal, and the surety has no power of revoking them) in favor of the surety, so as to narrow rather than enlarge his liability.

Discharge of the Surety by a Change in the Service or Employment of the Principal. — In the case of a guarantee of the honesty and good conduct of the principal in any particular course of dealing with the plaintiffs, that course of dealing is part of the essence of the contract with the surety, so that if it be altered, the surety is discharged ; (*n*) but if the course of dealing is left to the option of the plaintiffs entirely, or within certain limits, the surety cannot then complain of a variation [* 655] to which he has * agreed. (*o*) Where there is a bond of suretyship for the faithful execution of the duties of a public office, and by the act of the parties or by act of Parliament the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided (*p*). But where a principal is appointed to two

(*k*) *Curling v. Chalklen*, 3 M. & S. 509 ; *Phillips v. Foxhall*, L. R. 7 Q. B. 666 ; *M'Gahey v. Alston*, 1 M. & W. 41 L. J. Q. B. 293.

386.

(*l*) *Pothier (Obligations)*, Nos. 442, 443.

(*n*) *Arlington (Lord) v. Meyricke*, 2 Saund. 403.

(*o*) *Stewart v. M'Kean*, 10 Exch. 689 ; 24 L. J. Ex. 145.

(*m*) But see as to this, *Burgess v. Eve*, L. R. 13 Eq. 450 ; 41 L. J. Ch. 515 ; (*p*) *Pybus v. Gibb*, 6 Ell. & Bl. 911 ; 26 L. J. Q. B. 41.

distinct employments, and his sureties guarantee by one bond his good conduct in both, they are not discharged from liability as to one of the employments by the fact of his duties being altered and enlarged in the other, or as to either by the fact that an additional and distinct office is undertaken. (*q*) Where the condition of a bond was that a clerk should account for and pay over to the obligee, his executors or administrators, all moneys, bills, &c., which he should receive in the course of his employment as clerk to the obligee, it was held that the liability of the surety ceased with the death of the obligee, and could not be extended to a new employment by the executors. (*r*) And where the condition of the bond was that a clerk should, during the time he continued in the service of the plaintiff, faithfully account for and pay over all moneys which he should receive belonging to the plaintiff, and the breach assigned was the non-payment by the clerk of money which he had received on account of the plaintiff and his partner, it was held that this was beyond the scope of the defendant's engagement. (*s*)

Bonds and Guarantees under Seal to Partnerships and Associations.¹— If a bond be given to secure the faithful services of a clerk to a firm in partnership, or the repayment of advances made by the firm, and any change takes place in the constitution of the co-partnership, either by the death or retirement of existing partners or the accession of new partners, the contract of suretyship is at an end, unless it appears to have been the intention of the contracting parties that the security should be a continuing security, and should remain in force throughout all changes in the co-partnership. (*t*) This was held to be the case

¹ Baylies, Sur. & Guar. 127, 150, 403; Brandt, Sur. & Guar. c. 21; Article on Bonds of bank officers, 17 Alb. L. J. 340; article on Official Bonds of Officers of Private Corporations, by S. W. Peebles, 5 South. L. Rev. 810; U. S. Dig. tit. Bonds, III.; City Council v. Hughes, 55 Ala. 201.

(*q*) Skillett v. Fletcher, L. R. 1 C. P. 217; ib. 2 C. P. 469; 35 L. J. C. P. 154; 36 L. J. C. P. 206. (*t*) Bellairs v. Ebeworth, 3 Campb. 52; Chapman v. Beckington, 3 Q. B. 703; Lond. Ass. Co. v. Bold, 6 ib. 524;

(*r*) Barker v. Parker, 1 T. R. 287, 295. Mills v. Guard, &c., 18 L. J. Ex. 252; (*s*) Wright v. Russell, 3 Wils. 530; Montefiore v. Lloyd, 15 C. B. n. s. 203; 2 W. Bl. 934; Napier v. Bruce, 8 Cl. & F. 470; Montefiore v. Lloyd, 15 C. B. n. s. 203; 33 L. J. C. P. 49; Barclay v. Lucas, 3 Doug. 321.

where a bond was given by a surety to the several partners of a banking house *nominatim* to secure the repayment to them, "or either of them," of advances to be made "by them" to [* 656] the principal. (u) This * principle of construction, narrowing the liability of the surety, applies with still greater force in the case of bonds conditioned for the repayment of advances to be made to a firm, or to either of the partners. Where, therefore, a surety becomes bound for the repayment of advances made to two persons in partnership or to either of them, and one dies, the liability of the surety will not extend to advances made to the survivor. (x) If the liability of the surety is intended to continue after the retirement as well as the death of one of several persons in partnership, such intention must be manifested with a precision not to be mistaken. (y) By the 19 & 20 Vict. c. 97, sect. 4, which is simply an affirmance of the law as it previously stood, (z) it is enacted that no promise to answer for the debt, default, or miscarriage of another made to a firm, and no promise to answer for the debt, default, or miscarriage of a firm, shall be binding on the person making the promise in respect of anything done, or omitted to be done, after a change in any one or more of the persons constituting the firm, unless the intention of the parties that such promise shall continue to be binding, notwithstanding such change, shall appear either by express stipulation or by necessary implication. (a)

Limitation of the Liability of the Surety.—If a bond or guarantee is given by a surety to secure the repayment of advances of money to the principal, provided such advances do not exceed in the whole, at any one time, a certain limited amount, the proviso protects the surety from being answerable beyond the amount named, but does not render the obligation void if the advances go beyond it, (b) unless that clearly appears

(u) *Strange v. Lee*, 3 East, 489; *Weston v. Barton*, 4 Taunt. 673; *Dance v. Girdler*, 4 B. & P. 34.

(x) *Simson v. Cooke*, 8 Moore, 605.

(y) *Un. Camb. v. Baldwin*, 5 M. & W. 580, 586; *Backhouse v. Hall*, 6 B. & S. 507; 34 L. J. Q. B. 141.

(z) *Backhouse v. Hall*, *supra*.

(a) *Myers v. Edge*, 7 T. R. 254; *Dry v. Davy*, 10 Ad. & E. 30.

(b) *Seller v. Jones*, 16 M. & W. 112;

Gee v. Pack, 33 L. J. Q. B. 49; *Backhouse v. Hall*, *supra*.

to have been the intention of the parties. (c) A guarantee to secure moneys to be advanced to a third party on discount, "for the space of twelve calendar months," is countermandable within that time, although some bills may have been discounted and repaid before notice. (d) Where a surety gives a continuing guarantee limited in amount to secure the *floating balance* which may from time to time be due from the principal to the creditor, the guarantee is, as between the surety and the creditor, to be construed as applicable to a part only of the debt co-extensive with the amount of the guarantee. But a guarantee limited in amount for a debt already ascertained which exceeds that limit is not *prima facie* to be * construed as a secu- [* 657] rity for part of the debt only. It is a question of construction for the court. (e) Where the wife guaranteed as follows: "In consideration of you having at my request agreed to supply goods to my husband, I do hereby guarantee you the sum of £500," it was held to guarantee the payment of goods supplied after the date of the guarantee only. (f)

Continuing Liabilities. — Where a bond given by the defendant as surety recited that the plaintiffs had agreed to advance to the principal "any sums of money not exceeding, at any one or more time or times, the sum of £200 in the whole," and the bond was conditioned for the payment by the defendant as surety of "all and every such sum or sums of money, not exceeding the sum of £200 as aforesaid," as the plaintiffs should advance, it was held that this bond was a continuing or standing security, not confined to the first £200 advanced, but extending to all future advances and payments that might at any time be made by the plaintiffs. (g) The courts, however, in the case of contracts of suretyship under seal, lean in favor of a construction limiting the liability of the surety to some particular supply or advance, so as to confine it within an ascertained definite limit, rather than extending it to a general and continuous supply,

(c) *Parker v. Wise*, 6 M. & S. 246;
Gordon v. Rae, 8 Ell. & Bl. 1087.

(d) *Offord v. Davis*, 12 C. B. n. s.
 748; 31 L. J. C. P. 319.

(e) *Ellis v. Emmanuel*, 1 Ex. D. 157,
 C. A.

(f) *Morrell v. Cowan*, 7 Ch. D. 151,
 C. A.

(g) *Batson v. Spearman*, 6 Ad. & E.
 298.

creating an indefinite liability, from which the surety might have no means of relieving himself during the whole life of the principal. (*h*) In the case of simple contracts, on the other hand, no such leaning is found. Thus, where the defendant gave to the plaintiff a guarantee for the payment of "any goods he hath or may supply W. P. to the amount of £100," it was held that the guarantee was a continuing or standing guarantee, extending to all supplies of goods at any time furnished, so long as the parties continued to deal together. (*i*) So where the guarantee was "In consideration of your supplying my nephew with earthenware and china, I hereby guarantee the payment of any bills you may draw upon him on account thereof to the amount of £200," it was held to be a continuing guarantee, remaining as a standing security to the amount specified, so long as the supply of earthenware lasted. (*k*) From a continued liability under seal the surety has no means of escape at common law; he cannot recall the bond, covenant, or obligation that he has entered into, and say that he will be no longer responsible for advances or supplies to the principal, unless in the contract of suretyship he has expressly reserved to himself such a power; (*l*) and his liability may be prolonged indefinitely, and for the whole life of the principal. But in the case of simple contracts, the surety (though liable for all advances and supplies that have been made on the faith of his promise) may at any time revoke such promise, and discharge himself from the future and continuing liability by giving notice to that effect.

The following guarantees have been held to import a continuing liability: "I consider myself bound for any debt A. B. may contract with you in his business not to exceed £100;" (*m*) "I undertake to be answerable to the extent of £100 for any tallow supplied by you to A. B.;" (*n*) "I hereby agree to guarantee the payment of goods to be delivered in umbrellas to S. &

(*h*) *Kirby v. Duke of Marlborough*, 2 M. & S. 22.

(*i*) *Mason v. Pritchard*, 12 East, 227.

(*k*) *Mayer v. Isaac*, 6 M. & W. 612; *Hitchcock v. Humfrey*, 6 Sc. N. R. 549; *Horlor v. Carpenter*, 27 L. J. C. P. 1.

(*l*) *Hassell v. Long*, 2 M. & S. 370; *Calvert v. Gordon*, 1 M. & R. 497; 3 M. & R. 124.

(*m*) *Merle v. Wells*, 2 Campb. 413.

(*n*) *Bastow v. Bennett*, 3 Campb. 220.

Co., according to the custom of their trading with you, in the sum of £200;" (o) "As an inducement to you to sell W. C. goods and continue your dealings with him, I hereby undertake to guarantee you in a sum of £100, payable to you in default on the part of the said W. C. for two months;" (p) "In consideration of your agreeing to supply goods to K., we agree to guarantee any future debt with you to the amount of £600;" (q) "In consideration of the credit given by the H. G. C. Co. to my son, for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of £100; and in default of his payment of any accounts due, I bind myself by this note to pay to the H. G. C. Co. whatever may be owing, to an amount not exceeding the sum of £100." (r)

Guarantees not Importing a Continuing Liability.¹—The following guarantees have, on the other hand, been held to limit the liability of the surety to one solitary transaction, or to a particular course of dealing to a certain amount, and to be discharged or extinguished as soon as supplies or advances to the amount named have been made, and paid for or satisfied by the principal: "I engage to guarantee the payment of A. M. to the extent of £60, at quarterly account, bill two months, for goods to be purchased by him of you;" (s) "I agree to be answerable to K. for the amount of five sacks of flour, to be delivered to W. P., payable in one month;" (t) "I agree to be answerable for the payment of £50 for T. L. in case he does not pay for the gin he receives from *you." (u) [* 659] Where the guarantee was, "In consideration of your supplying Mr. S. with goods to the extent of £100, I undertake

¹ Brandt, Sur. & Guar. c. 5; Baylies, Sur. & Guar. 5, 124, 299; U. S. Dig. tit. *Guaranty*, sect. 323; 2 Story, Contr. sect. 1122; Crittenden v. Fiske, 46 Mich. 70; Young v. Brown, 53 Wis. 333.

(o) Hargrave v. Smea, 3 M. & P. 573. Coles v. Pack, L. R. 5 C. P. 65; Nottingham Hide, Skin, & Fat Market Co. v. Bottril, L. R. 8 C. P. 694; 42 L. J. C. P. 256.
 (p) Allan v. Kenning, 2 M. & S. 768.
 (q) Martin v. Wright, 6 Q. B. 917.
 (r) Wood v. Priestner, L. R. 2 Ex. 46, 282; 36 L. J. Ex. 42, 127; see for other cases of continuing guarantees, 593.
 (s) Melville v. Hayden, 3 B. & Ald. 593.
 (t) Kay v. Groves, 6 Bing. 276.
 (u) Nicholson v. Paget, 1 C. & M. 48.
 Heffield v. Meadows, L. R. 4 C. P. 595;
 38 L. J. C. P. 290; Laurie v. Scholefield,
 L. R. 4 C. P. 622; 39 L. J. C. P. 63;

to pay you if he does not," it was held that the liability of the surety was dependent upon credit to the amount of £100 being given if required, but that if the debtor did not demand £100 worth of goods, the surety would be liable for whatever was supplied. (x) But where the surety guarantees only the payment of one sum *in solido*, provided goods to the amount guaranteed are furnished, there is no cause of action against the surety until the full amount has been supplied. (y)

Conditions precedent to the Liability of the Surety.¹—If the continued liability of the surety is made dependent upon the observance of certain terms and conditions by the creditor, these terms must be strictly obeyed, or the surety will be discharged. (z). Therefore, where the creditor took a warrant of attorney from the principal debtor with a stipulation for the benefit of the surety that, on notice from the latter, the creditor should enter up judgment and levy execution upon the warrant of attorney, and apply the proceeds in reduction of the debt, and the creditor neglected to file the warrant of attorney and to keep it up as an efficient security, it was held that the surety was discharged. (a). Where a party has consented to be co-surety with another, he cannot be made responsible if the other party refuses or neglects to be bound. Where, therefore, one of two intended co-sureties executed a deed of covenant for the repayment of advances to be made to the principal debtor, on the understanding that the money would not be advanced until the deed was executed by the other surety, and the deed never was executed by the other surety, it was held that the executing surety was entitled in equity to be discharged from every part of the debt. (b) But

¹ As to the discharge of the surety or guarantor by the negligence of the creditor, amounting to more than mere delay, see Brandt, Sur. & Guar. c. 17, 18; Baylies, Sur. & Guar. 219; U. S. Dig. tit. *Principal and Surety*, sects. 964, 1041, 1121; ib. *Guaranty*, sect. 559; 2 Pars. Contr. 22; 2 Story, Contr. sect. 1131.

(x) *Dimmock v. Sturla*, 14 M. & W. 758; 15 L. J. Ex. 65. *Walmsley*, 12 C. B. x. s. 808; 31 L. J. C. P. 143.

(y) *Johnson v. Gandy*, 26 Law T. R. 72. (a) *Watson v. Alcock*, 22 L. J. Ch. 858; 17 Jur. 853.

(z) *Watts v. Shuttleworth*, 5 H. & N. 235; 29 L. J. Ex. 234; *Lawrence v.* (b) *Evans v. Brembridge*, 8 D. M. & G. 100; 25 L. J. Ch. 334; *Bonser v. Cox*, 4 Beav. 379.

a surety who has executed a bond on the faith of its being executed by the principal debtor also, cannot be released from his obligation on the ground that the principal has never executed it, if the principal has executed an instrument on which the surety may sue him and become a specialty creditor of him. (c)

Duty of the Person guaranteed. — Where the person guaranteed does any act injurious to the surety or inconsistent with his rights, or omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the

latter will be * discharged. (d) Thus in the cases of [* 660] bonds and guarantees given to an employer to secure the faithful services of a clerk or servant in his employment, the surety has a right to expect from the employer that he will call upon such clerk or servant to account in the ordinary course of business, and that he will not trust him beyond the bounds of ordinary prudence. (e) But the mere passive inactivity of the principal to whom a guarantee has been given, or his neglect to call the principal debtor to account and to enforce payment against him, do not discharge the surety; there must be some positive act done to the prejudice of the surety, or such a degree of negligence as to imply connivance and amount to fraud. The surety guarantees the honesty of the person employed, and is not entitled to be relieved from his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty. (f) If, however, the master discovers that the person employed has been guilty of dishonesty, he must inform the surety, who has thereupon a right to withdraw from his guarantee; (g) and if he omits so to do, the surety will be discharged so far as subsequent acts of dishonesty are concerned. (h)

(c) *Cooper v. Evans*, L. R. 4 Eq. 45; 36 L. J. Ch. 431.

(d) *Watts v. Shuttleworth*, 29 L. J. Ex. 234; 5 H. & N. 235.

(e) *Smith v. Bank of Scotland*, 1 Dow, 292.

(f) *Black v. The Ottoman Bank*, 15 Moo. P. C. 472.

(g) *Burgess v. Eve*, L. R. 13 Eq. 450; 41 L. J. Ch. 515.

(h) *Phillips v. Foxall*, L. R. 7 Q. B. 666; 41 L. J. Q. B. 293; *Sanderson v. Aston*, L. R. 8 Ex. 73; 42 L. J. Ex. 64.

Alteration of the Principal Obligation discharging the Surety.¹

— If a new contract is substituted in the place of the original contract, or if the original contract is altered in any material point without the surety's consent, so as to constitute a new agreement varying substantially from the former, the surety is no longer bound. (*i*) But where one enters into a bond as surety for the performance by another of two things which are separate and distinct, a subsequent alteration of the principal's contract as to one of them without the surety's consent does not release the surety from his contract of suretyship as to the other. (*k*) Where the defendant had as surety signed a joint and several promissory note with the principal debtor, having no reason to suppose that any one else was to sign it, and afterward the payee, without the knowledge of the defendant, induced another person to sign it in order to strengthen the security, it was held that the defendant was discharged from liability. (*l*) If [* 661] the guarantee is a * guarantee of the honesty and good conduct of the principal in any particular course of dealing with the plaintiff, that course of dealing is part of the agreement of the plaintiff with the surety, and the plaintiff cannot alter it and keep the surety liable. But when the course of dealing is left to the option of the plaintiff altogether, or within certain limits, and is allowed by the contract, the surety cannot complain of an alteration which he has himself permitted (*ante*, p. * 654).

Extension of the Time of Payment.² — If a man becomes surety

¹ Baylies, Sur. & Guar. 260; Brandt, Sur. & Guar. c. 15; 2 Dan. Neg. Instr. c. 71; U. S. Dig. tit. *Alteration of Instruments*, sect. 154; ib. tit. *Principal and Surety*, sect. 915; ib. tit. *Guaranty*, sect. 503; 2 Pars. Contr. 15; 2 Story, Contr. 1127; Baker v. Elliot, 73 Me. 392.

² As to the discharge of the surety or guarantor by the giving of time to the principal, see Baylies, Sur. & Guar. 240; Brandt, Sur. & Guar. c. 14; 2 Dan. Neg. Instr. c. 41; U. S. Dig. tit. *Principal and Surety*, sects. 1051-1120; ib. tit. *Guaranty*, sect. 515; Grabfelder v. Willis, 10 Ill. App. 330.

(*i*) Whitcher v. Hall, 5 B. & C. 276; (*l*) Gardner v. Walsh, 5 E. & B. 83; Bonar v. Macdonald, 3 H. L. C. 239; 24 L. J. Q. B. 284, overruling Catton v. Gen. St. Nav. Co. v. Rolt, 6 C. B. n. s. Simpson, 8 Ad. & E. 136; see also 550; Polak v. Everitt, 1 Q. B. D. 669. Holme v. Brunskill, 3 Q. B. D. 495.

(*k*) Harrison v. Seymour, L. R. 1 C. P. 518; 35 L. J. C. P. 264.

for the payment of a debt secured by the bond of the debtor, payable at a given day, and the creditor, before the day of payment has arrived, by an indorsement under seal on the bond, extends the time of payment, this is a material variation, amounting to the substitution of a new engagement in the place of the original contract, for the performance of which the surety is not bound. (*m*) Any enlargement of the time of payment by a binding contract with the principal debtor which ties up the hands of the creditor, and prevents him from suing the principal debtor upon the original obligation, discharges the surety, if it has been made without his assent or authority, inasmuch as the situation of the surety is varied and his liability prolonged beyond what was originally contemplated. (*n*) As soon as the principal debtor has made default, the surety has a right to step in and pay the debt, and require the creditor to sue, or allow him to sue, the principal in his, the creditor's name; and if the creditor has voluntarily placed himself in such a position as to be compelled to say he cannot sue the principal debtor, he thereby discharges the surety. (*o*) But a contract with a stranger to give time to the principal debtor, which contract does not prevent the surety from discharging the debt and pursuing his remedy over against the principal debtor, will not discharge such surety from liability; (*p*) and it must be proved that there was either a new security given to extend the time of payment, or a binding agreement upon sufficient consideration to suspend the remedy. (*q*) If after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal without the consent or knowledge of the surety, the surety is *discharged. (*r*) [* 662]

(*m*) *Rees v. Berrington*, 2 Ves. 542.

(*n*) *Combe v. Woolfe*, 8 Bing. 162; 1 M. & Sc. 241; *Eyre v. Bartrop*, 3 Mad. 221; *Nisbet v. Smith*, 2 Br. C. C. 578. As to guarantees authorizing the giving time to the principal debtor, see *Cowper v. Smith*, 4 M. & W. 519; *Un. Bank of Manch. v. Beech*, 3 H. & C. 672; 34 L. J. Ex. 133.

(*o*) *Williams, J., Strong v. Foster*, 17 C. B. 219; *Bailey v. Edwards*, 34 L. J. Q. B. 45; 4 B. & S. 761; *The Oriental*

Financial Corporation v. Overend, Gurney, & Co., L. R. 7 Ch. 142; 41 L. J. Ch. 332.

(*p*) *Fraser v. Jordan*, 8 Ell. & Bl. 312.

(*q*) *Parke, B., Moss v. Hall*, 5 Exch. 50; *Bingham v. Corbitt*, 34 L. J. Q. B. 37.

(*r*) *Liquidators of Overend, Gurney, & Co. v. Liquidators of Oriental Financial Corporation*, L. R. 7 H. L. 348.

The mere giving of additional security by the principal to the creditor is not of itself a giving of time by the creditor to the principal. (*s*)

There is no obligation of active diligence against the principal debtor on the part of the creditor. It is the business of the surety to see that the principal pays, not that of the creditor. (*t*) A mere promise, therefore, without consideration, not to sue the principal debtor for a certain time will not discharge the surety, (*u*) nor mere laches, or forbearance, or an omission on the part of the creditor, promisee, or obligee, to press the debtor or party liable, and sue him for the money, without any suspension of the legal remedies. (*x*) Nor will a parol agreement to enlarge the time of payment discharge the surety, when the principal obligation is under seal, inasmuch as such parol agreement cannot in any way alter or affect the legal operation of the deed, or restrict or suspend the right of action thereon; neither will the acceptance by the creditor of a collateral security from the principal debtor operate as a discharge of the surety, if the position of the latter has in nowise been altered or varied thereby; (*y*) nor will the surety be discharged, if he himself has assented to the alteration of the principal obligation. In the case of an accommodation bill, known to be such to all the parties, the acceptor can only be considered a surety for the drawer, so that, if time be given to the drawer by a binding agreement, without the knowledge and concurrence of the acceptor, the acceptor is discharged. (*z*)

R and H, being partners, consigned goods to China, and the money was remitted to the plaintiffs, and R and H drew bills on them whether sufficient money was remitted or not, and plaintiffs accepted fresh bills to enable them to take up their former acceptances, and so give time to R and H. R and H discontinued partnership, of which plaintiffs had notice. Plain-

(*s*) Liquidators of Overend & Gurney v. Liquidators of Oriental Corp., *supra*. Goring v. Edmonds, 6 Bing. 91; Dawson v. Lawes, 23 L. J. Ch. 434.

(*t*) Wright v. Simpson, 16 Ves. 734; (y) Twopenny v. Young, 3 B. & C. 210; Bell v. Banks, 3 Sc. N. R. 503.

(*u*) Tucker v. Laing, 2 K. & J. 749. (z) Laxton v. Peat, 2 Campb. 186;

(*x*) Orme v. Young, Holt, 84; Lond. Bailey v. Edwards, 4 B. & S. 761; 34 L. J. Q. B. 41.

Ass. Comp. v. Buckle, 4 Moore, 153;

tiffs renewed some bills by accepting new bills of H. It was held that R was not a surety, but remained a principal with H, and was not discharged by the giving of time to H. (a)

Proof of Suretyship where the Relation does not appear upon the Face of the Contract. — The doctrine of discharge by giving time is not confined to cases where the relation of suretyship * appears on the face of the original contract between [* 663] the creditor, the principal, and the alleged surety. (b)

The equity arises from the relation of the co-obligors, or co-promisors *inter se*, and on the knowledge by the creditor of the existence of that relation. (c) It is held to be inequitable in the creditor knowingly to prejudice the rights of the surety, although he may know of the existence of the relation of suretyship only at the time of his dealing with the principal debtor so as to prejudice such rights. (d) But extraneous evidence is not admissible for the purpose of showing that a party who, on the face of the contract, has incurred a primary liability, was only intended to be secondarily liable as a surety after the default of another principal contracting party. (e)

Effect of giving Time to the Principal Debtor with Reserve of Remedies against the Surety. — If after the principal debtor has made default and the surety has become liable to the payment of the debt, the creditor, by a binding contract, agrees to give his principal debtor time for payment, and in the same contract expressly stipulates for the reservation of all his remedies against the surety, the latter will still remain liable, notwithstanding the arrangement between the principal and the creditor. (f) "The reserve of remedies," observes Parke, B., "has that effect upon this principle: first, it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and secondly, it prevents the rights of the surety against the principal

(a) *Swire v. Redman*, 1 Q. B. D. 536.

(b) *Rayner v. Fussey*, 28 L. J. Ex. 132.

(c) *Davies v. Stainbank*, 6 De Gex, M. & G. 696; *The Oriental Financial Corporation v. Overend, Gurney, & Co.*, L. R. 7 Ch. 142; 41 L. J. Ch. 332. See same case in *H. of L.*, ante, p. * 662.

(d) *Pooley v. Harradine*, 7 El. & B. at

p. * 441; *Greenough v. M'Clelland*, ante,

p. * 650; *Bailey v. Edwards*, 4 B. & S.

761; 34 L. J. Q. B. 41; *Taylor v. Burgess*, 1 Law T. R. n. s. 12.

(e) *Hollier v. Eyre*, 9 Cl. & Fin. 45.

(f) *Ld. Eldon, Ex parte Glendenning*, Buck's B. C. 519.

debtor being impaired, the injury to such rights being the other reason; for the principal debtor cannot complain if, the instant afterward, the surety enforces those rights against him; and his consent that the creditor shall have recourse against the surety is impliedly a consent that the surety shall have recourse against him." (g) And if a security is taken which by extending the time of payment would operate to release the surety, the creditor may prove by parol evidence that an agreement was come to between the creditor and the principal debtor that the transaction should not have that effect, and may thus keep alive the liability of the surety. (h)

In the French law, and also in the civil law, an enlargement [* 664] of the time given to the principal creditor for payment does not discharge the surety. "When," observes Pothier, "the creditor, after the contract has been entered into, accords, through liberality, a certain term of payment to his debtor, he cannot lawfully exclude the sureties from a participation in the benefit of such term; for as the agreement has the effect of qualifying the liability upon the principal obligation, and extending the term of payment, the obligation of the sureties necessarily receives the same modification, and they have the same term of payment as the principal debtor, it being the essence of the contract of suretyship that the surety should not be obliged to more than the principal." (i)

Release of the Principal Debt — Discharge of the Surety.¹ —

If a debt secured by the collateral undertaking of a surety be unconditionally released or satisfied, the engagement of the surety is at an end, the extinguishment of the principal obligation necessarily involving in it the discharge of the surety. *Reo liberato liberantur fidejussores.* (k) If, therefore, a creditor, by deed of composition, releases his debtor, and precludes himself

¹ As to the discharge of the surety or guarantor by release or payment of the principal debt, see Baylies, Sur. & Guar. 274, 288; Brandt, Sur. & Guar. c. 13; 2 Dan. Neg. Instr. c. 41; U. S. Dig. tit. *Principal and Surety*, sect. 903.

(g) *Kearsley v. Cole*, 16 M. & W. 613; *Boaler v. Mayor*, 19 C. B. n. s. 76; 135; *Price v. Barker*, 4 Ell. & Bl. 779; 34 L. J. C. P. 230.
24 L. J. Q. B. 134.

(i) Pothier (*Obligations*), No. 381.

(h) *Wyke v. Rogers*, 21 L. J. Ch. (k) *Webb v. Hewitt*, 3 Kay & J. 444; *Vorley v. Barrett*, 26 L. J. C. P. 1.

from suing upon the original obligation for the original debt, the surety is discharged, unless the rights of the creditor against the surety have been expressly reserved on the face of the deed, (l) or unless by the terms of the guarantee the surety is not discharged by the release of the principal debtor. (m) "The surety," observes Pothier, "is discharged by novation of the debt; for he can no longer be bound for the first debt for which he was a surety, since it no longer subsists, having been extinguished by the novation; neither can he be bound for the new debt into which the first has been converted, since this new debt is not the debt for which he became bound." (n)

Release of the Principal Obligation, with Reserve of Remedies against the Surety. — But if the principal debtor has made default, so that the liability of the surety has accrued, and the creditor has an immediate right of action against him, the creditor may compound with the principal debtor, receiving a portion only of the debt, and may release him from the payment of the residue, and at the same time reserve all his rights and remedies against the surety. A deed of release of this sort, with reserve of remedies against the surety, is construed as a covenant not to sue, in order that effect may be given to the intention of the * parties, and the right of recourse against [* 665] the surety be preserved. (o) Where, therefore, upon the grant of an annuity, two co-sureties entered into a joint and several covenant for the payment by them of the annuity in case of default made by the grantor, and default was made by him, and the co-sureties became liable upon their covenant, and a deed was then entered into between the grantor and grantee of the annuity and one of the co-sureties, whereby, in consideration of all arrears of the annuity being paid up by such co-surety, the latter was released from the future payment of the annuity, and from all farther liability upon his covenant, but it was provided that nothing therein contained should prejudice the rights of the grantee of the annuity as against the grantor and the

(l) *Lewis v. Jones*, 4 B. & C. 513, 515; *Green v. Wynn*, L. R. 4 Ch. 204; 38 L. J. Ch. 76, 220; Dig. lib. 14, tit. 3.

(m) *Union Bank of Manchester v. Beech*, 3 H. & C. 672; 34 L. J. Ex. 133.

(n) Poth. (*Ob.*) No. 378; Cod. lib. 8, tit. 41, lex 4.

(o) *Nevill's Case*, L. R. 6 Ch. 43; *Bateson v. Gosling*, L. R. 7 C. P. 9; 41 L. J. C. P. 53.

other co-surety, it was held that this proviso prevented the release from operating as a discharge of the co-surety, as it did not in anywise prejudice the latter or increase his liability. (*p*) But a release of a debt "in like manner as if the debtor had obtained a discharge in bankruptcy," is an absolute release, and if given without the surety's consent, discharges him. (*q*) It seems to be the result of the authorities that a release qualified by a reserve of the remedies against sureties allows the surety to retain all his rights over against the principal debtor, and operates only so far as the rights of the surety may not be affected; (*r*) but it remains to be considered in every case whether the arrangement between the principal debtor and the creditor does prejudicially affect the rights or remedies of the surety; (*s*) for if it does, the surety is entitled to say that he is discharged. (*t*)

Release of one of Several Co-Sureties.—A release by the creditor of one of two or more co-sureties releases all. (*u*) From some of the expressions of Lord Eldon, (*x*) it would seem that a creditor might release one of his joint debtors, and yet by using some language of reservation in the agreement between himself and such debtor keep his remedy entire against the others even without consulting them; but Lord Eldon's authority upon this point has been expressly overruled. (*y*)

Payment by the Principal Debtor Operating as a Discharge of the Surety.—If a party becomes surety for the due payment of all money that comes to the hand of the principal, the [* 666] surety is * discharged if the principal pays in such currency as the parties to whom the payment is to be made are willing to accept. If, therefore, they have the option of receiving cash, and choose, nevertheless, to take bills or notes from the principal, which are ultimately dishonored, the surety is nevertheless discharged. Thus where a country banker was appointed treasurer of a poor law union, and the defendant

(*p*) *Thompson v. Lack*, 3 C. B. 552; (*t*) *Wright v. Sandars*, 3 Jur. n. s. 507.
Kearsley v. Cole, 16 M. & W. 135.

(*q*) *Cragoe v. Jones*, L. R. 8 Ex. 81; (*u*) *Cheetham v. Ward*, 1 B. & P. 633.
 42 L. J. Ex. 68. (*x*) *Ex parte Gifford*, 6 Ves. 808.

(*r*) *Price v. Barker*, ante, p. * 663. (*y*) *Nicholson v. Revill*, 4 Ad. & E.

(*s*) *Owen v. Homan*, 20 L. J. Ch. 683; *Evans v. Bremridge*, 25 L. J. Ch. 104; as to release of one of several joint contractors, see post, p. * 1222.

became surety to the guardians for the due performance by him of the duties of his office, and the treasurer made a payment to the guardians, partly in cash and partly in the notes of his own bank, payable on demand, and the guardians kept the notes for a day or two, and the bank then stopped payment, it was held that the guardians, having elected to receive and keep the notes, could not, after the stoppage of the bank, repudiate the payment as against the surety. (z) A payment accepted by the creditor in good faith and without notice, but which is afterward avoided as a fraudulent preference, does not operate as a satisfaction of the debt or discharge the surety. (a)

If the primary security proves worthless, whether it was so originally, or whether it become so afterward, the surety is not discharged unless the loss or deficiency of the original and primary security was occasioned by the act of the creditor. (b) If the principal debtor has a set-off against the creditor arising out of the same transaction, the surety may take advantage of it in an action against him by the creditor for the amount guaranteed. (c)

Fraud on Sureties.¹—A creditor is not bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, unless the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence. (d) If a person abstains from inquiry because he sees that the result of inquiry will be to disclose fraud, his want of knowledge of the fraud affords no excuse. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge. (e) If when a person agrees to become surety, any material part of the contract between the debtor and creditor is misrepresented or concealed from the

¹ Fraud, discharging the surety or guarantor, see Baylies, Sur. & Guar. 214, 296, 423; Brandt, Sur. & Guar. c. 16; 2 Story, Contr. (5th ed.) sect. 1124.

(z) *Guard. Lich. Up. v. Greene*, 1 H. the civil law was the same, Dig. lib. xvi. & N. 889. tit. 2, sect. 4.

(a) *Petty v. Cooke*, L. R. 6 Q. B. 790.

(b) *Hardwick v. Wright*, 35 Beav. 133.

(c) *Bechervaise v. Lewis*, L. R. 7 C. P. 372; 41 L. J. C. P. 161; the rule of

(d) *Hamilton v. Watson*, 12 Cl. & Fin. 119; *Wythes v. Labouchere*, 5 Jur. n. s. 499.

(e) *Owen v. Homan*, 4 H. L. C. 1035.

the latter. (q) The surety need not wait for the commencement of an action against the principal; (r) but he cannot accelerate the liability of the latter; and if he pays money voluntarily which he was not under any legal obligation to pay, he has no ground of action against the principal until the time of payment is past. A surety who has paid the debt of his principal is entitled to rank as a simple contract creditor for the amount, and if made executor, to retain it out of the assets of the principal against all other creditors of equal degree. (s) If A has expressly agreed to indemnify B against a particular claim or demand, and an action is brought on that demand against B, B may then give notice to A to come in and defend the action, and if A refuses to come in, B may compromise at once on the best terms he can get, and then bring an action on the contract of indemnity. On the other hand, if B does not choose to trust A with the defence to the action, he may if he pleases go on and defend it, and if the verdict is obtained against him and judgment signed on it, that judgment is conclusive, because that is the meaning of the contract between the parties. (t)

[* 669] * By the French law, whether the surety has paid in consequence of a judgment of a court of law, or voluntarily and without legal process, is a matter of no moment; for in either case *utiliter debitoris negotium gerit*. He has procured his discharge from the debt, and ought, consequently, to be reimbursed what it cost him to do so. But if he has paid before the time of payment has elapsed, he cannot have recourse against the principal debtor until afterward; for he ought not by his own act to deprive the latter of the term of indulgence which he has a right to enjoy. (u) The surety may, however, by express contract, obtain a right to sue the latter before he has himself paid or satisfied the principal obligation. If the principal, for example, covenants with the surety that he will pay the creditor

(q) *Kearsley v. Cole*, 16 M. & W. 128; *Boyd v. Brooks*, 34 L. J. Ch. 605.

"Si quid autem fidejussor pro reo solverit, ejus recuperandi causa habet cum eo mandati judicium." — *Inst.* lib. 3, tit. 21, sect. 6.

(r) *Small v. Currie*, 5 De G. M. & G. 159.

(s) *Boyd v. Brooks*, 34 L. J. Ch. 605.

(t) *Per Mellish, L. J., Parker v. Lewis*, L. R. 8 Ch. 1035, 1059.

(u) *Poth. (Obl.) Nos.* 431, 439; *Dig.* lib. 17, tit. 1, lex 22.

the debt by a day named, and makes default, the surety may sue him for the amount, although he has not himself at the time he brings the action, paid any portion of the debt. (*x*) By the law of France, and by the civil law, the surety is under no necessity for securing to himself this right by express contract; for whenever the principal debtor falls into embarrassed circumstances, and is threatened with insolvency, that law accords to the surety a right to attach the goods and chattels of the principal debtor, and so provide himself with funds beforehand to answer the engagement he has entered into on his behalf. (*y*)

If the surety has bound himself for the payment of a debt due from several joint debtors, and has been compelled to pay money on their joint account, they are jointly responsible to him for the repayment of the amount. (*z*)

Contribution between Co-Sureties.¹— It has previously been stated that if several persons together become surety for one principal in respect of the same debt and transaction, either jointly or severally, or by the same or different contracts, (*a*) and one of such co-sureties, after the liability of the principal has arisen, pays the debt or satisfies the whole debt or claim, or more than his own proportion of it, he may have recourse to his co-sureties for contribution, and recover from them their several proportions of the common liability in an action for money paid by him for their use, (*b*) unless the plaintiff seeking contribution has promised to save the defendant harmless, (*c*) or the defendant has become surety at the request of the plaintiff and for his accommodation. (*d*) * In equity, where one of [* 670] three sureties had paid a sum of money, it was held that he was entitled to recover one moiety from another of the

¹ Sheldon, Subrog. (1882), sect. 141; Baylies, Sur. & Guar. c. 15, 20; Brandt, Sur. & Guar. c. 11; U. S. Dig. tit. *Principal and Surety*, sect. 711; 1 Para. Contr. 31; 2 Story, Contr. sects. 1144–1152.

(*x*) *Loosemore v. Radford*, 9 M. & W. 657. of each other's liability; *Dering v. Earl of Winchelsea*, 1 Cox, 318; *Whiting v. Burke*, L. R. 10 Eq. 539; ib. 6 Ch. 342.

(*y*) Poth. (*Obl.*) No. 442; Cod. lib. 4, tit. 35, lex 10. (*b*) *Kemp v. Finden*, 12 M. & W. 421.

(*z*) Poth. (*Obl.*) No. 440. (*c*) *Thomas v. Cooke*, 8 B. & C. 728.

(*a*) And although they do not know (*d*) *Turner v. Davies*, 2 Esp. 478.

co-sureties, the third having become insolvent; (e) but at law one of three co-sureties could only recover against any one of the others an aliquot proportion of the money paid, regard being had to the number of the sureties. (f)

If one of two co-sureties pays part of the debt only, and less than his moiety, he is not entitled to resort to his co-surety for contribution, for the latter might subsequently have to pay an equal or greater portion of the debt, in the former of which cases such co-surety would have no contribution to pay, and in the latter he would have one to receive; and it would tend to multiplicity of suits and great inconvenience if each co-surety might sue all the others for a ratable proportion of what he had paid the instant he had paid any part of the debt. But whenever it appears that one has paid more than his proportion of what the co-sureties can ever be called upon to pay, then, and not till then, it is also clear that such part ought to be repaid by the others, and that an action will lie for it. (g) Where the plaintiff and defendant, together with the principal debtor, signed a joint and several promissory note, payable two months after date, as sureties for such principal debtor, and the latter paid only a portion of the amount of the note on its becoming due, and the plaintiff then paid the residue, although no demand had been made upon him by the creditor for payment, and subsequently brought his action against the defendant, his co-surety, for contribution, it was held that he was entitled to recover a moiety of the amount he had paid. (h) All persons who by common consent put their names to an accommodation bill, whether as drawers, acceptors, or indorsers, in order that one of them may get the bill discounted for his own benefit, are co-sureties for the due payment of the bill; and if the bill is dishonored at maturity, and one of them is compelled to pay the amount of the bill, and thus releases all the other parties from their common liability upon the instrument, the one so paying is entitled to contribution from the others. (i)

(e) *Peter v. Rich*, 1 Ch. C. 34; *Hitchman v. Stewart*, 3 Drew, 271. 6 M. & W. 169; *Ex parte Snowden*, 17 Ch. D. 44.

(f) *Browne v. Lee*, 6 B. & C. 697; (h) *Pitt v. Purssord*, 8 M. & W. 539.
Kemp v. Finden, 12 M. & W. 421. (i) *Reynolds v. Wheeler*, 10 C. B.

(g) *Parke, B., Davies v. Humphreys*, n. s. 561; 30 L. J. C. P. 350.

The principle of contribution amongst sureties has been established by the French jurists, observes Pothier, upon a principle of equity which does not permit the co-sureties, who were all equally liable to the payment, and have all been equally benefited by the discharge of the principal obligation, to profit at the expense of * him by whom the payment [* 671] has been made, and who has acted for the benefit of his co-sureties at the same time that he was acting for himself. (k) The civil law does not admit the principle of contribution between co-sureties, but enables each of them, before action brought, to protect himself from being sued for more than his own share. (l) A surety is bound to bring into hotchpot for the benefit of his co-sureties a security given to him by the principal debtor, although he only consented to be surety upon having such security given him, and although the other sureties were not even aware of his having taken such security. (m)

Assignments of Judgments and Securities to the Surety to enable him to obtain Indemnification.¹— Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, is entitled (19 & 20 Vict. c. 97, sect. 5) to have assigned to him, or to a trustee for him, every judgment, specialty, or other security held by the creditor in respect of the debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the

¹ A surety, on paying the debt for his principal, is entitled to be subrogated to all the securities, funds, liens, and equities which the creditor holds against the principal debtor, or as a means of enforcing payment from him. Sheldon, Subrog. (1882) sect. 86; and for a full discussion of the whole subject of subrogation in cases of suretyship, see ib. c. 3.

Brandt, Sur. & Guar. c. 12; Baylies, Sur. & Guar. c. 17; U. S. Dig. tit. *Principal and Surety*, sect. 623; 2 Story, Contr. (5th ed.) sect. 1141; article on Right of a creditor to his sureties' securities, by J. Willard, 14 Am. L. Rev. 839.

(k) "Ayant quant à l'effet géré l'affaire de ses confédés, en même temps qu'il faisait la sienne, les ayant par la payment qu'il a fait libérés d'une dette qui leur était commune avec lui, l'équité exige qu'ils portent leur part de ce payment, dont ils ont profité autant que lui." — POTH. (*Obl.*) No. 455; Argentré, 213, art. 194.

(l) Dig. lib. 46, tit. 1, lex 39; Inst. lib. 3, tit. 21, sect. 4.

(m) Steel v. Dixon, 17 Ch. D. 825, following two American cases: Miller v. Sawyer, 30 Vern. 412; Hall v. Robinson, 8 Iredell, 56.

payment of the debt or the performance of the duty, and such person is entitled to stand in the place of the creditor and use all the remedies, and, if need be and upon a proper indemnity, to use the name of the creditor in any action or other proceeding, in order to obtain from the principal debtor or any co-surety, co-contractor, or co-debtor, indemnification for the advances made and loss sustained by the person who has paid the debt or performed the duty, and the payment or performance by the surety is not pleadable in bar of any such action or other proceeding by him; but no co-surety, co-contractor, or co-debtor is entitled to recover from any other co-surety, co-contractor, or co-debtor more than the just proportion to which, as between these parties themselves, the latter is justly liable. (n) This section applies to a contract entered into before the passing of the act, provided a breach of it has taken place and payment has been made by the surety after the passing of the act. (o)

The creditor is bound to give to the surety the benefit of every security which he holds at the time of the contract, and [* 672] is * not in equity allowed in any way to vary the position of the surety with reference to those securities; (p) and every security which the creditor has the benefit of at the time the contract of suretyship is entered into is supposed to be made known to the surety at the time he is entering into the obligation; and if through any neglect on the part of the creditor he is deprived of the benefit of them, or is put into a different position from that which he was in at the time the contract was entered into, he is discharged. (q) But the surety is not entitled to have an assignment of the principal security unless he pays the debt in full. (r) The indorser of a bill is a surety to the holder for the payment, and having paid the bill, he is entitled to the benefit of any securities deposited with the

(n) *Batchellor v. Lawrence*, 9 C. B. x. s. 543; 30 L. J. C. P. 42; *Drew v. Lockett*, 32 Beav. 499; *Strange v. Fooks*, 4 Giff. 408. (q) *Newton v. Chorlton*, 10 Hare, 650; *Strange v. Fooks*, 4 Giff. 412; *Forbes v. Jackson*, 19 Ch. D. 615; *Wulff v. Jay*, L. R. 7 Q. B. 756; 41 L. J. Q. B. 322. See also *Rainbow v. Juggins*, 5 Q. B. D. 138; C. A. 422.

(o) *De Wolf v. Lindsell*, L. R. 5 Ex. 209; *Lockhart v. Reilly*, 1 De Gex & J. 464; 27 L. J. Ch. 54. (r) *Ewart v. Latta*, 4 Macq. H. L. C.

(p) *Pearl v. Deacon*, 24 Beav. 186; 26 L. J. Ch. 761. 983.

holder by the acceptor, even although he was ignorant of such deposit. (s)

Judgment against Principal not binding Sureties. — A judgment recovered against a principal does not bind a surety who is entitled to have the case proved *de novo*. (t)

Breach of Contracts of Indemnity. — Bankruptcy of Principal Debtor. — If the principal debtor becomes bankrupt, or is discharged by a resolution under sect. 125 of the Bankruptcy Act, 1869, the surety remains liable; (u) but if he has paid the debt he has a right to stand in the place of the original creditor against the estate of the principal debtor, and if the creditor has received a dividend out of that estate, the surety has a right to be paid that dividend, or to have it deducted from the amount for which he is liable, (x) and to have all future dividends secured to him, (y) unless he has agreed to waive this right for the benefit of the creditor. (z) Where a surety guaranteed the payment of any debt which the principal debtor might contract from time to time with the plaintiffs as a running balance of account, to any amount not exceeding £400, and the plaintiffs, on the faith of this guarantee, allowed the principal to get into their debt to the extent of £825, and the principal then became insolvent and assigned his effects to trustees for the benefit of his creditors, and the plaintiffs proved their debt of £825 against his estate, and received from the trustees a dividend thereon of 8s. 9d. in the pound, and then brought an action against the surety on the guarantee, it was held that the * divi- [* 673] dend was to be deducted ratably from the whole debt, as well the part covered by the guarantee as the part which was left uncovered; and that the plaintiffs were trustees for the surety of the dividend of that portion of the debt which was covered by the guarantee, and could only recover from the surety the balance remaining of the £400 after deducting the dividend. (a) So where two persons separately guaranteed

(s) *Duncan & Co. v. N. & S. Wales Bank*, 6 Ap. Cas. 1.

(t) *Ex parte Young*, 17 Ch. D. 668.

(u) *Ellis v. Wilmot*, L. R. 10 Ex. 10.

(x) *Gee v. Pack*, 33 L. J. Q. B. 49; *Hobson v. Boss*, L. R. 6 Ch. 792.

(y) *Thornton v. M'Kewan*, 1 Hem. & M. 525; 32 L. J. Ch. 69.

(z) *The Midland Banking Co. v. Chambers*, L. R. 7 Eq. 179; ib. 4 Ch. 398.

(a) *Bardwell v. Lydall*, 5 M. & P. 335; *Gee v. Pack*, 33 L. J. Q. B. 49.

the payment of all goods supplied to A B, so that their liability should not exceed £250 each, and goods were supplied to A B to the amount of £657, and he then became bankrupt and the creditor proved for the whole amount, and having obtained £250 from each of the guarantors, afterward received 2s. 1d. in the pound on the £657, it was held that each of the guarantors was entitled to a part of this dividend, bearing to the whole the same proportion as £250 to £657. (b)

Recovery of Interest on Money paid by Sureties.—In cases of contracts of indemnity or suretyship, where a surety has been compelled to pay money which the principal debtor ought to have paid, and has, consequently, been damnified by the loss of the use of his money, he is entitled, in an action on the implied contract of indemnity against the principal, to recover interest on the money he has been compelled to pay; (c) for in every contract of indemnity the party damnified is entitled to recover all such damages, costs, and charges as reasonably and naturally result from the fulfilment by him of the obligation he has contracted on behalf of the principal debtor. (d)

Guarantees by one of Several Partners in the Name of the Co-Partnership.—Where one of several partners gave a guarantee in the trading name of the firm to secure the payment of a debt of a third party, it was held by Lord Ellenborough that there was no implied authority resulting from the mere existence of the co-partnership to any one or more of the partners to pledge the partnership name for such a purpose. (e) And where one of two attorneys in partnership together, in order to obtain the discharge of a client from custody, signed the partnership name to an undertaking to pay the debt and costs, it was held that the other partner, who had given no express authority to his colleague to give such an undertaking, could not be sued thereon, as the giving of guarantees and undertakings of such a description was not within the usual course of business of attorneys; and the law, therefore, would raise no inference of

(b) *Hobson v. Bass*, L. R. 6 Ch. 792;
Midland Bank Co. v. Chambers, L. R. 4
 Ch. 398.

(d) *Smith v. Howell*, 6 Exch. 737.

(c) *Petre v. Duncombe*, 20 L. J. Q. B.
 242; *Ex parte Bishop*, 15 Ch. D. 400.

(e) *Duncan v. Lowndes*, 3 Campb.
 478.

any authority from the one *partner to bind the other [*674] by such an undertaking. (*f*) But if the guarantee, when it has been given, is notified to the firm, and they do not dissent from it, or if it refers to a partnership transaction, and is given to secure the payment of goods supplied or money advanced to the firm, and received by the co-partnership and added to the joint stock, or if it has been given to secure the performance of something within the ordinary scope and business of the firm, and which one partner generally has power to undertake for on behalf of the firm, it binds all the partners, and all are liable to be sued thereon. (*g*)

SECTION II.

OF MARINE INSURANCE.

Of Contracts of Insurance.¹—The contract of insurance is a contract whereby one of the contracting parties agrees to take

¹ Our author divides insurance, almost at the outset of his treatment of it, into the distinct branches, Marine Insurance, Fire Insurance, Life Insurance, &c. Some American discussions which cannot properly be cited under either separate head, but are more appropriately mentioned as involving all, are, 1 Phillips, Insurance, c. 1, Of the Contract of Insurance, in which the nature of insurance is defined, the form of the contract discussed, the effect of a provisional agreement for insurance and of a formal execution of the contract explained, and a delineation of the provisions common in policies, and accounts of the law of renewals, assignments, alterations, cancellations, correction, and judicial construction are given; also Lawson, Usages, sects. 108–125; U. S. Dig. tit. *Insurance*, I. general principles; note on Clauses in policies stipulating not to sue, or agreeing to arbitrate, by A. S. Biddle, 17 Am. Law Reg. n. s. 490; and see Phoenix Ins. Co. v. Badger, 53 Wis. 283; Borden v. Hingham Mut. Ins. Co., 18 Pick. 523, 29 Am. Dec. 614; note on Overvaluation of insured property, ib. 616, by A. C. Freeman; and article on Insurance Agents by J. O. Pierce, 5 South. L. Rev. n. s. 663. Rep. N. Y. Civ. Code, tit. 11, c. 1, Of insurance in general, devotes eighty-nine sections to a statement of rules of insurance law, irrespective of distinctions between

(*f*) Hasleham v. Young, 5 Q. B. Sandiland v. Marsh, 2 B. & Ald. 679; 833; 13 L. J. Q. B. 205; Brettell v. Ex parte Gardom, 15 Ves. 286; In re Williams, 4 Exch. 629. West of England Bank, 14 Ch. D. 317.

(*g*) Ex parte Notte, 2 Gl. & Jas. 306;

upon himself, and protect the other from, the risks and accidents to which any particular property or any particular individual may be exposed, and covenants or promises, in consideration of a sum of money which the other contracting party pays or binds himself to pay to him as the price of the risk run, to indemnify the latter against these risks and accidents. The party who takes the risks upon himself, or undertakes to indemnify, is called the assurer or insurer, and commonly in our law the underwriter, from his subscribing his name at the bottom of the contract; the party protected by the contract, the assured or insured; and the money paid as the price of the indemnity, the premium for the risk; whilst the contract itself, or rather the written instrument evidencing or constituting it, is called a policy of insurance. Many discussions have taken place respecting the precise nature of this contract. Pothier calls it a species of contract of sale. The assured, he says, are the vendors, the assurer the purchaser, and the thing sold is a risk attached to the thing assured. (a) Other writers make the contract a contract of letting and hiring; some declare it to be a contract of mandate, and others a contract of partnership. [* 675] ship. In our own law it is considered, so far as it relates to sea risks and risks of fire, to be a guarantee or contract of indemnity.

Mutual Insurance consists in the association of different proprietors of property exposed to the same risk, with a view of indemnifying at the common expense those members who suffer loss. The members of such an association are at the same time insurers and insured; and the engagement which each of them contracts with the association at large as an insurer is the consideration or price of the insurance or indemnity which the society promises or guarantees to him in return. (b)

marine, fire, life, &c.; they are, however, propounded as recommendations to the Legislature rather than as exact statements of existing law.

Whether an application for insurance tacitly but not formally accepted by officers of the company, or an oral or informal written promise to insure, can be enforced as a complete contract equivalent to a policy, see *Covenant Mut. Ben. Assoc. v. Conway*, 10 Ill. App. 348; *Baile v. St. Joseph Fire, &c. Ins. Co.*, 73 Mo. 371; 21 Am. L. Reg. n. s. 37, and note; *State Ins. Co. v. Shaw*, 54 Md. 546.

(a) Pothier, *Contrat d'Assurance*, No. 4.

(b) *Encyc. du Droit, Assurance*.

Policies of Insurance.¹ — The owner of the property or interest insured generally pays to the insurer or underwriter a premium at a certain rate per cent; and the latter then subscribes the ordinary written or printed instrument, called a policy of insurance, whereby he expresses that he "doth make assurance" and cause the party "to be insured" in a certain sum, on certain specified property, for a certain voyage or for a certain time, against certain risks and perils which are enumerated and set forth in the policy. The policy is frequently preceded by a "slip," which is a short memorandum of the terms of the insurance, to which the underwriters subscribe their initials, with the sums for which they are willing to engage. But the slip is often nothing more than an offer or proposal of terms preliminary to the contract. (c)

Voyage and Time Policies. — Valued and Open Policies.² — When the insurance is on a voyage from one port to another without reference to time, the policy is called a voyage policy; but when it is from one fixed period to another, such as "from the 1st of March, 1875, to the 1st of January, 1876," or for three, six, or twelve months, &c., the policy is a time policy. Sometimes a policy is so made as to be partly a voyage policy and partly a time policy. (d)²² When the value of the property insured, as between the assured and the underwriter, is expressed on the face of the policy, the policy is called a valued policy. (e) When it is not so expressed, but is left to be estimated in case of loss, the policy is called an open policy. In the one case the declared value establishes the pecuniary interest and loss of the

¹ As to policies of marine insurance, see Hine & Nichols, New Dig. Ins. tit. *Policy*, 400, 706; 1 Pars. Mar. Ins. c. 2, 4; 1 Phillips, Ins. c. 1, 5; Sansum, Dig. Ins. tit. *Policy*, 979; U. S. Dig. tit. *Insurance*, sect. 648; policies construed favorably to the insured, *Allen v. St. Louis Ins. Co.*, 85 N. Y. 478.

As to re-insurance, see 1 Pars. Mar. Ins. c. 9; 1 Phillips, Ins. sects. 374, 404, 498; 2 ib. sects. 1248, 1506, 1751, 2145, 2173; U. S. Dig. tit. *Insurance*, sect. 791; Sansum, Dig. Ins. 1180; Hine & Nichols, New Dig. Ins. 532.

² 1 Pars. Mar. Ins. c. 6, 7, 10, 11; 2 Phillips, Ins. c. 11, 14; 1 ib. sect. 949; Sansum, Dig. Ins. 1463; U. S. Dig. tit. *Insurance*, sects. 718, 733.

(c) *Rogers v. Macarthey*, Park. Ins. 39; *Parry v. The Great Ship Co.*, 4 B. & S. 556; 33 L. J. Q. B. 41; *post*, p. * 679.

(d) *Gambles v. Ocean Marine Ins. Co.*, 1 Ex. D. 141, C. A.

(e) *Wilson v. Nelson*, 5 B. & S. 354; 33 L. J. Q. B. 220.

²² See Appendix, Vol. III.

assured as between himself and the underwriter; and in the other the value has to be proved. "The only effect of the valuation is fixing the amount of the prime cost just as if the parties admitted it at the trial;" and this must be fairly done, [* 676] with a view of obtaining a fair indemnity; * for if the policy be enormously overvalued, that will be evidence of fraud. (*f*) In the absence, however, of fraud or wagering, the value stated in the policy is conclusive, however largely in excess of the true value, (*g*) unless it appears that there is some mistake as to the thing insured. (*h*) If the value declared is the value of a full cargo, and at the time of the loss there was not a full cargo on board, the insurers are not liable for the full amount of the declared value, but only for the real loss, and the policy in such case must be treated as an open policy; (*i*) for as the contract is strictly a contract of indemnity for a real loss, the law will not permit it to be made a means of profit and gain to one of the parties at the expense of the other (*post*, p. * 725).

When the insurance is on goods, to be thereafter declared and valued, the assured has the power, by duly declaring and valuing before knowledge of the loss, to make the policy a valued policy; but if the assured do not so declare and value, it is then an open policy, and the interest is matter of evidence at the trial. The declaration, when made, does not require the assent of the underwriters. It is generally put upon the policy for convenience; but this is not necessary, nor is there any necessity for its being in writing. The making of the declaration is not a condition precedent which must be fulfilled by the assured before the liability of the underwriters attaches; yet, in order to be available, it must be made and communicated to the underwriters, or some one on their behalf, before intelligence has been received of the loss of the subject-matter of insurance. If it is not so made and communicated, the policy becomes, as we have already seen, an

(*f*) *Lewis v. Rucker*, 2 Burr. 1171.

(*i*) *Tobin v. Harford*, 13 C. B. n. s.

(*g*) *Irving v. Manning*, 1 H. L. Cas. 791; 17 C. B. n. s. 528; 34 L. J. C. P. 287; *Barker v. Janson*, L. R. 3 C. P. 307.

(*h*) *Williams v. North China Ins. Co.*, 1 C. P. D. 757, C. A.; see *post*, p. * 725.

37. The same rule prevails in the case of a valued policy on freight. *Denoon v. Home & Colonial Ass. Co.*, L. R. 7 C. P. 341; 41 L. J. C. P. 162.

open policy. (*k*) Where goods are insured at a value very greatly in excess of their real value, the non-disclosure of this circumstance to the underwriter may avoid the policy. (*l*) The rule is that all facts should be disclosed which are material to enable an underwriter to judge whether he shall accept the risk, and at what rate; not that merely facts should be disclosed which are material to the risk. (*m*) Where the loss of the ship is not the risk insured against, but the risk depends upon some other contingency not known to have happened, the fact of the loss of the ship being known to both parties at the time the insurance is effected will not invalidate the policy; for the knowledge that will vitiate a policy * must be a knowledge of [* 677] the loss of the subject-matter of the contract. (*n*) When the premium is paid down and received at the time of the making of the contract, the policy is not usually signed by both parties, but only by the insurer; and in these cases, therefore, it partakes of the nature of a guarantee, the insurer warranting the safe arrival of the ship, cargo, or merchandise at the place of destination.

Insurable Interests.¹ — **Wagering and Gaming Policies of Insurance.**²³ — By the 19 Geo. II. c. 37, sect. 1, it is enacted that no assurance shall be made by any person on any ship, or on any goods or merchandise laden on board thereof, interest or no interest, or without further proof of interest than the policy, by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such insurance shall be void. (*o*) The fact of a person being named both shipper and consignee in a bill of lading is *prima facie*, but not conclusive, evidence of an insurable interest in him. If he is a mere agent without lien on the goods, or possession of them as a bailee, or liability to account

¹ Hine & Nichols, New Dig. Ins. 261, 700; 1 Pars. Mar. Ins. c. 5; 1 Phillips, Ins. c. 3; Sansum, Dig. Ins. 683; U. S. Dig. tit. *Insurance*, sect. 596.

As to wager policies, Sansum, Dig. Ins. 1460; 1 Phillips, Ins. sects. 5-7, 211; U. S. Dig. tit. *Insurance*, sects. 760, 102.

(*k*) Harman v. Kingston, 3 Campb. 151; Robinson v. Touray, ib. 159.

(*l*) Ionides v. Pender, L. R. 9 Q. B. 531.

(*m*) Rivaz v. Gerussi, 6 Q. B. D. 222.

(*n*) Gledstanes v. R. Ex. Ass. Co., 5 B. & S. 797; 34 L. J. Q. B. 30; Mead

v. Davison, 3 Ad. & E. 307.

(*o*) Lowry v. Bourdieu, 2 Doug. 468; Kent v. Bird, 2 Cowp. 583.

²³ See Appendix, Vol. III.

for their loss by the perils insured against, he has no insurable interest. (*p*) An insurance on profits of goods laden on board a vessel is an assurance on goods within the meaning of this statute, (*q*) and so it seems is an insurance upon commission. (*r*) Freight, or the profit derivable from the carriage of goods or the hire of a vessel, constitutes a good insurable interest; and so does the profit which the shipowner ordinarily makes from carrying his own goods in his own vessel to a distant market, or any profits fairly expected to be made in the due course of trade; (*s*) also the special property which a carrier has in the goods intrusted to him to carry, (*t*) or the interest which an executor has in the property of his testator before probate of the will has been granted, or the interest which captors have in time of war in the prizes taken by them, (*u*) or which the crown has in prizes before condemnation, or the freight which the freighter of a vessel has paid in advance, or the legal and equitable interest which mortgagors and mortgagees have in the mortgaged property, or the interest which a party has in the security of property the safety of which he has guaranteed for some determinable period, (*x*) * or the interest which a purchaser has in specific, ascertained chattels bought by him, but which remain in the hands of the vendor, covered by the lien of the latter for the unpaid purchase-money, (*y*) or which the charterer of a vessel, or the hirer or lessee of personalty or realty, has in the property intrusted to him to be used for hire. It has been decided, but after the greatest possible difference of opinion, that the purchaser of a "cargo" at so much per cwt. cost and freight, which is to be loaded when a ship which is expected arrives, has no insurable interest. (*z*) A defeasible or inchoate

(*p*) *Seagrave v. Union Marine Insurance Co.*, L. R. 1 C. P. 305; 35 L. J. C. P. 172.

(*q*) *Smith v. Reynolds*, 1 H. & N. 223; 25 L. J. Ex. 337; *De Mattos v. North*, L. R. 3 Ex. 185; *Allkins v. Jupe*, 2 C. P. D. 357.

(*r*) *Allkins v. Jupe*, *supra*.

(*s*) *M'Swiney v. R. Ex. Ass. Co.*, 14 Q. B. 634; 18 L. J. Q. B. 193; *Chope v. Reynolds*, 5 C. B. N. S. 642; 28 L. J. C. P. 194.

(*t*) *Crowley v. Cohen*, 3 B. & Ad. 478.

(*u*) *Le Cras v. Hughes*, Park. Ins. 568; *Boehm v. Bell*, 8 T. R. 154; *Irving v. Richardson*, 2 B. & Ad. 193.

(*x*) *Waters v. Monarch Life Ass. Co.*, 5 E. & B. 870; 25 L. J. Q. B. 102.

(*y*) *Sparkes v. Marshall*, 3 Sc. 172.

(*z*) *Anderson v. Morice*, 1 Ap. Cas. 713.

interest may be insured as well as an absolute and perfect interest, but not a mere expectancy. (a) The wages of labor cannot be assured; for it would take away the stimulus to exertion to secure to the workman the payment of his wages at all events, and would be contrary to public policy. Where the insurance does not exclude British ships, they must be taken to be included. (b) Formerly the interest which the underwriter himself acquires in the safety of the property he has insured could not have been re-insured; (c) but by the 27 & 28 Vict. c. 56, sect. 1, re-insurance may now be effected upon any ship or vessel, or upon any goods.

Whenever the policy is effected on property valued at a certain sum, and it is expressly provided that the policy shall be deemed sufficient proof of interest, the insurance is in principle an insurance, "interest or no interest," and void within the statute. (d) As no person can sue upon a policy who is not really interested therein, it follows that, if the assured assigns away his interest after the making of the policy, he cannot maintain an action upon it for his own benefit. He can sue upon it only in one way, *i.e.* as a trustee for the assignee in a case where the policy is handed over to him upon the assignment. (e) But wherever he sustains a *bona fide* loss by the destruction of the subject-matter of the insurance, he is entitled to be indemnified, and may sue upon the contract; and the court will not allow underwriters to get rid of their liability merely because the name of the party they have agreed to indemnify is not on the register. (f) If the policy is on goods lost or not lost, the indemnity extends to past as well as future losses; and it is no answer, therefore, to an action on such a policy to say that the interest was not acquired until after the loss. (g) As the fact of the ship being lost at the time the policy is effected does not prevent such policy from attaching, so also the * fact [* 679]

(a) *Devaux v. Steele*, 6 Bing. N. C. 371; *Stockdale v. Dunlop*, 6 M. & W. 233.

(b) *Allkins v. Jupe*, *supra*.

(c) 19 Geo. II. c. 37.

(d) *Murphy v. Bell*, 4 Bing. 567; 1 M. & P. 493.

(e) *Powles v. Innes*, 11 M. & W. 10.

(f) *Hutchinson v. Wright*, 27 L. J. Ch. 835.

(g) *Sutherland v. Pratt*, 11 M. & W. 312.

unknown to the parties that the ship has arrived safely does not prevent a policy from attaching, and the premium is payable thereon. (*h*)

Requisites of the Contract.²⁴—Contracts of insurance must be expressed in a policy which must specify the particular risk or adventure, the names of the subscribers, and the sums insured. (*i*) If any of these particulars are omitted, or if the policy is for any time exceeding twelve months, it is void. (*k*) And no policy can be pleaded or given in evidence unless it is duly stamped, except in the case of mutual insurances, or, formerly, of policies made abroad. (*l*) But the slip, although not valid as a contract, may be given in evidence to show the intention of the parties. (*m*) By the 28 Geo. III. c. 56, it is enacted that it shall not be lawful for any person to effect a policy of insurance upon any ship, or upon any goods, merchandise, or property whatever, without first inserting in such policy the name or the usual style and firm of one or more of the persons interested in such insurance, or of the consignor or consignee, or of the person in Great Britain receiving the order to insure and effecting the insurance, or of the person who shall give the order to the agent immediately employed to negotiate the policy. (*n*) If the policy is effected by the policy broker or agent "for the benefit of all parties interested," these last may become privy to the contract by adopting it; (*o*) and any person who acquires an interest in the subject-matter of the insurance, whilst it is covered and protected by such a policy, may sue thereon for an indemnity against loss. (*p*). The subject-matter of the insurance must be

(*h*) *Bradford v. Symondson*, 7 Q. B. D. 456.

(*i*) 30 Vict. c. 23, sect. 7; *Reid v. Allan*, 4 Exch. 326; *Fisher v. The Liverpool Marine Insurance Co.*, L. R. 8 Q. B. 469; 42 L. J. Q. B. 224; *Ex parte Hargrove*, L. R. 10 Ch. 542; *Edwards v. Aberayron Ship Ins. Soc.*, 1 Q. B. D. 563.

(*k*) 30 Vict. c. 23, sects. 7, 8.

(*l*) 30 Vict. c. 23, sect. 9. The exception as to policies made abroad is repealed; see St. L. R. Act, 1875. As to the making of alterations in the policy,

see 30 Vict. c. 23, sect. 10. By sect. 12, insurances by carriers by sea are to be deemed to be contracts for sea insurance.

(*m*) *Ionides v. Pacific Insurance Co.*, L. R. 7 Q. B. 517; 41 L. J. Q. B. 190.

(*n*) *Wolff v. Horncastle*, 1 B. & P. 316; *Mellish v. Bell*, 15 East, 6; *Hibbert v. Martin*, 1 Campb. 538.

(*o*) *Hagedorn v. Oliverson*, 2 M. & S. 490; *Barlow v. Leckie*, 4 Moore, 8; *Stirling v. Vaughan*, 11 East, 619.

(*p*) *Sutherland v. Pratt*, 11 M. & W. 296.

correctly and clearly described, so that the things insured may be ascertained and identified, and so that it may be known to what articles the risk attaches, whether it be to the ship, the freight, or the whole or part of the cargo. (*q*) The policy need not be expressed to be a re-insurance where such is the fact, though it would seem that if such a fact were intentionally concealed and were material, the policy might be rendered void by the fraud. (*r*) But wherever the peculiar nature of the interest alters the risk, such *interest is the subject- [* 680] matter of the insurance, and must be stated in the policy. (*s*)

Matters and Things covered by the Policy.²⁵—If a person insures a cargo to be laden on board on the Brazilian coast, the policy will not cover and protect a cargo taken on board on the coast of Africa. (*t*) If the ship only is insured, the policy will not, of course, cover and protect the merchandise laden on board; (*u*) and if the insurance is merely on "the ship's tackle and furniture," it will not cover stores, harpoons, lines, and fishing-tackle put on board to be used in the whale fishery, (*x*) unless the vessel is described in the policy as a whaling vessel, and the insurance is declared to be made on a whaling adventure. The provisions of the crew are covered by a policy on "the furniture of the ship." (*y*) But if a ship is disabled and puts into port to refit, or is detained by an embargo, the extraordinary wages and provisions for the crew during the detention cannot be charged against the underwriter of a policy on the ship, cargo, and furniture. (*z*) A mere mistake in the name of the ship will not avoid the policy and discharge the underwriters if the identity of the vessel with the vessel named in the policy is clearly established, and the underwriters have in nowise been prejudiced by the mistake. (*a*) Whatever is con-

(*q*) *Crowley v. Cohen*, 3 B. & Ad. 485.

(*r*) *Mackenzie v. Whitworth*, L. R. 10 Ex. 142; 1 Ex. D. 36, C. A.

(*s*) *Mackenzie v. Whitworth*, *supra*; 1 Ex. D. p. 42.

(*t*) *Robertson v. French*, 4 East, 130.

(*u*) *Molloy*, b. 2, c. 7, sect. 8.

(*x*) *Hoskins v. Pickersgill*, Park. Ins. 126.

(*y*) *Brough v. Whitmore*, 4 T. R. 206.

(*z*) *Robertson v. Ewer*, 1 T. R. 132;

De Vaux v. Salvador, 4 Ad. & E. 420.

(*a*) *Le Mesurier v. Vaughan*, 6 East,

385; *Ionides v. Pacific Ins. Co.*, L. R. 6 Q. B. 674; 7 Q. B. 517; 41 L. J. Q. B. 190.

²⁵ See Appendix, Vol. III.

sidered by the custom and usage of trade to be comprehended under the term "goods, specie, and effects," will be covered by a policy upon such property. Money expended by the captain in the course of the voyage for the use of the ship, and for which *respondentia* interest was charged, is in some trades included by custom under these words. (b) A general policy of insurance on goods laden on board a particular vessel extends to all goods which form part of the cargo, and will cover and protect goods laden on deck, provided it is customary for goods to be so laden, and the risk of the insurer is not thereby increased beyond what must be presumed to have been contemplated at the time the insurance was effected. (c) If the insurance is upon all goods that may be laden on board a particular vessel on an outward and homeward voyage, the policy will attach on any goods that may be carried out or brought back on board such vessel. (d)

If the insurance is on goods from "any port or ports [*681] in the East Indies" * to "any port or ports" in this country, the insurance will cover any goods that may be shipped from the East Indies for England, whatever vessel may be selected for their conveyance. (e) And if an insurance is effected on goods on board "any ship or ships" that may sail during a particular period from one port to another or from one part of the world to another, and goods of the assured are laden on board different vessels, some of which arrive safe and others are lost, the assured will have a right to apply the policy to the ships that are lost, and the underwriters cannot discharge themselves from liability by showing that ships answering the description in the policy have arrived safe. (f)

Oral evidence is admissible to explain the customary meaning of terms used in a particular trade, but not to add a new term to the contract, or to show that more things were intended to be insured than are ordinarily or customarily included under the express terms of the contract.

(b) *Glover v. Black*, 1 Park. Ins. 10;
see *Mackensie v. Whitworth*, L. R. 10
Ex. 142; 1 Ex. D. 36, C. A.

(c) *Da Costa v. Edmunds*, 4 Campb.
142.

(d) *Grant v. Paxton*, 1 Taunt. 463.

(e) *Hunter v. Leathley*, 10 B. & C.
858.

(f) *Kewley v. Ryan*, 2 H. Bl. 343.

Implied Warranties¹—Seaworthiness of the Vessel²—Time Policies and Voyage Policies.²⁶—There is an implied warranty in voyage policies on the part of the insurer that the ship insured is seaworthy, “tight, staunch, and strong,” at the time of the commencement of the voyage; (*g*) but in the case of time policies there is no such warranty, although the time policy be effected upon an outward-bound ship lying in a British port where the insuring owner resides, or on a new vessel about to undertake her first voyage. (*h*) Before the assured, however, can recover against the underwriter upon a voyage policy, “he is bound to prove not only that the ship was tight, staunch, and strong, but that she was properly equipped with sails and stores, and that she was manned with a sufficient crew to navigate her on the voyage insured. These are conditions precedent to the

¹ As to implied warranties in policies, see 1 Pars. Mar. Ins. 367; 1 Phillips, Ins. c. 8; and as to warranties generally, see U. S. Dig. tit. *Insurance*, sect. 868; Hine & Nichols, New Dig. Ins. 684; Sansum, Dig. Ins. 1493.

² The seaworthiness of a vessel is generally presumed; but where a vessel springs a leak soon after the risk commences, without any apparent cause, from perils within the policy, a presumption of unseaworthiness arises; see cases cited 7 U. S. Dig. 687, sect. 972; *Field v. Ins. Co. of North America*, 3 Md. 244; so where she suddenly founders with all sails set shortly after leaving port, *Treat v. Union Ins. Co.*, 56 Me. 231; but to the contrary, see *Patrick v. Hallett*, 1 Johns. 241; *Moses v. Sun Ins. Co.*, 1 Duer, 159. Where no intelligence has been received of a ship within a competent time after she has sailed, it may be presumed that she foundered at sea (2 Marsh. Ins. 488); no precise time is established for this presumption, but each case must depend on its particular circumstances, having regard to the voyage (*Gordon v. Bowne*, 2 Johns. 150); as in the case of a missing steamship on the Atlantic, the usual time for such passages is to be considered (*Oppenheim v. Leo Woolf*, 3 Sandf. Ch. 571); and where a vessel takes fire, and sinks afterward, the presumption of unseaworthiness does not arise (*Pointer v. Merchants', &c. Ins. Co.*, 20 La. Ann. 100). The burden of proof is not upon the plaintiff to show in the first instance the seaworthiness of the vessel at the inception of the voyage (*Treat v. Union Ins. Co.*, 56 Me. 231), but on the insurer to show its unseaworthiness (*Taylor v. Lowell*, 3 Mass. 331; *Paddock v. Franklin Ins. Co.*, 11 Pick. 227; *Martin v. Fishing Ins. Co.*, 20 ib. 389; *Adderly v. American, &c. Ins. Co.*, Taney, 126). The burden of proving compliance with an express warranty, whether affirmative or negative, in a policy of insurance, rests upon the assured. *McLoon v. Commercial, &c. Ins. Co.*, 100 Mass. 472.

Neglect to take a pilot is a breach of the implied warranty of seaworthiness. *Whitney v. Ocean Ins. Co.*, 14 La. 485, 33 Am. Dec. 595, and note, ib. 599. See, further, *Lunt v. Boston Co.*, 6 Fed. Reporter, 562.

(*g*) *Cohn v. Davidson*, 2 Q. B. D. 455. 240; *Gibson v. Small*, 4 H. L. C. 353;

(*h*) *Fawcus v. Sarsfield*, 6 Ell. & Bl. *Small v. Gibson*, 16 Q. B. 158; *Michael* 200; 25 L. J. Q. B. 249; *Thompson v. v. Tredwin*, 17 C. B. 551; see also *Dud-Hopper*, 6 Ell. & Bl. 172; 25 L. J. Q. B. *geon v. Pembroke*, 2 Ap. Cas. 284.

²⁶ See Appendix, Vol. III

policy attaching, and if they are not complied with, so that the perils are enhanced, from whatever cause this may arise, and though no fraud was intended by the assured, the underwriters have a right to say they are not liable;" (i) but the assured is not obliged to keep the ship seaworthy throughout the voyage or during the period of the risk. (k) The insured warrants that the ship is seaworthy for the purposes of the particular subject-matter of the insurance. Therefore, in the case of a [* 682] policy of insurance on deck cargo, it is not a * compliance with the warranty of seaworthiness that the ship is fit to encounter ordinary rough weather with safety to herself because the deck cargo is such as may be readily jettisoned in such weather. (l) The insurer is entitled to expect that the shipowner will do all that can reasonably be expected to be done to limit the risk covered by the insurance to those perils incidental to navigation which the care and skill of man cannot provide against. But where the nature of the adventure and the size and class of vessel to be employed are known to both parties, the implied warranty of the shipowner cannot be carried farther than that he shall do his utmost to make the particular vessel as fit for the voyage as she can possibly be made. Therefore in sending a river steamer across the ocean, the warranty of seaworthiness is complied with if the nature of the adventure is disclosed to the underwriter, and the owner does as much as can reasonably be done to make her fit for the voyage, though she may not be considered seaworthy in the ordinary sense of the term as applied to ordinary sea-going vessels. (m)

Non-compliance with the requirements of the statutes respecting the engagement of the crew does not render a vessel unseaworthy; it must be shown that the crew was actually insufficient in number, or that there was a want of capacity in the master or other officers. (n) If a ship becomes leaky or founders without

(i) *Ld. Ellenborough, Wedderburn v. Bell*, 1 Campb. 1; *Douglas v. Scougall*, 4 Dow, 269.

(k) *Jenkins v. Heycock*, 8 Moo. P. C. 361; *Biccard v. Shepherd*, 14 Moo. P. C. 471.

(l) *Daniells v. Harris*, L. R. 10 C. P. 1.

(m) *Burges v. Wickham*, 3 B. & S. 669; 33 L. J. Q. B. 17; *Clapham v. Langton*, 34 L. J. Q. B. 46.

(n) *Redmond v. Smith*, 8 Sc. N. R. 270.

any adequate cause as soon as she leaves the port, the presumption is that the vessel was unseaworthy at the time she put to sea. (o) If the vessel is not properly found with cables, anchors, and ground-tackling, she is unseaworthy; (p) and so she is if she has an insufficient crew or an incompetent captain, or has no pilot on board at those parts of the voyage where a pilot is required; (q) but if a competent master and crew and pilot have been provided in the first instance, the insurer is not discharged by their negligence or want of skill; "for there is no implied warranty on the part of the assured for the continuance of the seaworthiness of the vessel or for the performance of their duty by the master and crew or pilot during the whole course of the voyage." (r) If the master is unable, from stress of weather or other causes, to procure a pilot, this is a risk covered by the * policy, and the insurer remains liable. (s) And if [* 683] by accident or mistake a vessel sails out of port in an unseaworthy state, and the defect is remedied before any loss occurs, and she then sails again in a seaworthy state, the insurer will be liable on the policy for a subsequent loss. (t) The parties may make any stipulations they think fit in the policy respecting the seaworthiness of the vessel; and the insurer may consent to take her as seaworthy, or insure conditionally, on certain repairs being done. The assured also impliedly warrants that a loss shall not happen through his own personal default, and that he will himself do nothing to enhance the risk. If he neglects to have the ship properly documented according to her national character, or if he furnishes her with simulated papers without the knowledge of the underwriters, these last will be released from all liability upon the policy in respect of losses occasioned by the neglect, as such increased risk is not the risk they intended to take upon themselves. (u)

(o) *Davidson v. Burnand*, L. R. 4 C. P. 117.

(p) *Watson v. Clark*, 1 Dow, 336; *Parker v. Potts*, 3 ib. 23; *Wilkie v. Geddes*, ib. 57.

(q) *Tait v. Levi*, 14 East, 481.

(r) *Sadler v. Dixon*, 8 M. & W. 895; 5 M. & W. 415.

(s) *Phillips v. Headlam*, 2 B. & Ad. 383.

(t) *Weir v. Aberdeen*, 2 B. & Ald. 320; but see *The Quebec Marine Insurance Co. v. The Commercial Bank of Canada*, L. R. 3 P. C. 234.

(u) *Oswell v. Vigne*, 15 East, 70; *Pipon v. Cope*, 1 Campb. 434. But if the master violates the 16 & 17 Vict. c. 107 (*post*, p. * 690), by stowing a portion of the cargo on deck, and sails with-

If the insurance attaches before the voyage commences, it is enough if the state of the ship is commensurate with the then risk; and if the voyage is such as to require a different complement of men or state of equipment in different parts of it, as if it be a voyage down a canal or river, and thence to and on the open sea, it is enough if the vessel be at the time when she enters upon each stage of the navigation properly manned and equipped for it. (x) In the case of an insurance on goods, there is no implied warranty that the goods are fit to encounter the ordinary risks or vicissitudes of the voyage; and it is no answer to the claim of the insurer to say that the goods were in an unfit condition to be shipped, unless it can be shown that the loss arose from that unfitness. (y) In the case of an insurance on goods on board an English ship there is no implied warranty that the ship shall continue English. (z)

In a voyage policy of insurance "at and from a port," there is an implied warranty that the ship shall be at the port within such a time that the risk shall not be materially varied; [* 684] and if there * is delay beyond such time, the policy does not attach. (a) It is a question for the jury whether the fact of the ship proving unseaworthy shortly after starting shows that it was so before starting. The burden of proof is upon the underwriters to show that the ship was unseaworthy at starting. (b)

Express Warranties.¹—Every positive averment or allegation on the face of a policy of insurance of facts material to the risk, forming the basis of the contract, "amounts to a warranty; and if such allegation be not strictly true, the assured cannot recover

¹ 1 Pars. Mar. Ins. 337; 1 Phillips, Ins. c. 9; also Hine & Nichols, New Dig. Ins. 684; Sansum, Dig. Ins. 1493; U. S. Dig. tit. *Insurance*, sect. 868.

out a certificate of clearance, the absence of that document does not create a statutory unseaworthiness so as to discharge the underwriter. *Wilson v. Rankin*, L. R. 1 Q. B. 162; 35 L. J. Q. B. 87.

(x) *Dixon v. Sadler*, 5 M. & W. 414; 8 M. & W. 899; *Bouillon v. Lupton*, 15 C. B. n. s. 138; 33 L. J. C. P. 37; *The Quebec Marine Insurance Co. v. The Commercial Bank of Canada*, *supra*.

(y) *Koebel v. Saunders*, 17 C. B. n. s. 78; 33 L. J. C. P. 310; *Boyd v. Dubois*, 3 Campb. 132.

(z) *Dent v. Smith*, L. R. 4 Q. B. 414; 38 L. J. Q. B. 144.

(a) *De Wolf v. Archangel Insurance Co.*, L. R. 9 Q. B. 451.

(b) *Pickup v. Thames Ins. Co.*, 3 Q. B. D. 594.

on the policy, to whatever cause the loss be owing, whether the loss be connected with the subject of such warranty or wholly independent of it; for it is a condition on which the contract is to take effect, which failing, the contract fails." (c) ²⁷ But every representation inserted in a contract does not, as we shall hereafter see (*post*, pp. * 981, * 982), amount to a warranty. A written memorandum, statement, or representation does not become part of the policy from being folded up in it, or pinned on thereto; (d) but if the policy refers to it or to any separate writing or memorandum, the two documents may then be placed in juxtaposition and read together. (e) When there is a warranty that the vessel "is well" on the day the insurance is effected, the warranty is complied with if the vessel was safe at any time on the day named, so that if the vessel should have been lost in the morning of that day, and the insurance be effected in the afternoon, the underwriters will be liable. (f) The warranties most frequently met with in maritime policies are warranties of the time of sailing, of departure with convoy, and warranties of neutrality.

Time of Sailing ²⁸—When the vessel is warranted to sail by a particular day, the underwriter will be discharged if she does not sail at the time appointed; and the circumstance of her being prevented by inevitable accident, or restraint, or detention of princes, does in nowise exonerate the assured from the consequences of his breach of contract. (g) When the vessel has left her loading port with all her cargo and clearances on board, with no other object in view than to get in the safest way she can to the port of delivery, this is a sailing within the meaning of the warranty, although she does not proceed straight to sea, but sails to some general place of rendezvous to wait for convoy. (h) But * she must be actually out of port or be [* 685] sailing down a river towards the sea, and have made a *bona fide* commencement of the voyage, in order to satisfy a war-

(c) *Le Blanc, J., De Lothian v. Henderson*, 3 B. & P. 515; *De Hahn v. Hartley*, 1 T. R. 343; *Ollive v. Booker*, 1 Exch. 423.

(d) *Pawson v. Ewer*, 1 Doug. 11 n.

(e) *Routledge v. Burrell*, 1 H. Bl. 254; *Worsley v. Wood*, 6 T. R. 710.

(f) *Blackhurst v. Cockell*, 3 T. R. 360.

(g) *Hore v. Whitmore*, 2 Cowp. 784.

(h) *Bond v. Nutt*, 2 Cowp. 601; *Wright v. Shiffner*, 11 East, 515; *Thellusson v. Fergusson*, 1 Doug. 361; *Cockrane v. Fisher*, 1 C. M. & R. 809; *Lang v. Anderdon*, 3 B. & C. 495.

^{27, 28} See Appendix, Vol. III.

ranty to sail. (*i*) If the warranty be to sail after a specific day, and the ship sails before, or if it be not to sail during a particular period of the year, and the ship sails during the prohibited period, the liability on the policy does not attach, as the risk is a different risk from the one agreed to be run by the underwriter. (*k*)

Warranties — Sailing with Convoy.²⁹—If a vessel warranted “to depart with convoy” is proceeding from her loading port to the nearest place of rendezvous for convoy and is captured, the underwriters are nevertheless responsible, as the vessel was fulfilling the warranty at the time of the capture in the only mode in which it could be fulfilled, and was proceeding to secure convoy and departing with convoy in the mercantile sense of the term and according to the usage of trade. (*l*) A warranty that the vessel shall “depart with convoy,” does not mean merely that she is to sail out of port or from the place of general rendezvous with convoy, but that she is to have convoy for the whole voyage insured, unless prevented by stress of weather, (*m*) or unless it is the usage for ships to be convoyed only part of the distance, and convoy beyond a certain point is not deemed necessary and is not provided by the government. (*n*) The mode and nature of the convoy are regulated by mercantile usage, and it is never considered necessary for the ship to be convoyed throughout by the same vessels, there being in general relays of convoy from stage to stage. (*o*)

Neutrality.³⁰—Whenever property is insured as neutral property which is not neutral property, there is no contract, and no action can be maintained on the policy. But if the property is neutral at the time the insurance is effected and the risk attaches on the policy, the circumstance of its ceasing to be so at a subsequent period does not affect the underwriter's liability. (*p*)

(*i*) *Moir v. R. Exch. Ass. Co.*, 4 Campb. 84; *Ridsdale v. Newnham*, 3 M. & S. 456; *Graham v. Barras*, 5 B. & Ad. 1011.

(*k*) *Vezian v. Grant*, 2 Park. Ins. 670; *Colledge v. Harty*, 6 Exch. 205.

(*l*) *Anderson v. Pitcher*, 2 B. & P. 164.

(*m*) *Jefferyes v. Legendra*, 1 Show. 297; *Lilly v. Ewer*, 1 Doug. 72.

(*n*) *D'Eguino v. Bewicke*, 2 H. Bl. 551.

(*o*) *De Garey v. Clagget*, 2 Park. Ins. 708.

(*p*) *Eden v. Parkinson*, 2 Doug. 732; and see *Dent v. Smith*, L. R. 4 Q. B. 414; 38 L. J. Q. B. 144.

"If a war break out the next day, the underwriter is liable." (q) It is no answer to an action on a policy of insurance that the goods were contraband of war, and were shipped for the purpose of being sent to a belligerent port, unless facts establishing a fraudulent *concealment (*infra*) are set [* 686] forth. (r) The sentence of a foreign court of admiralty or prize court, falsifying the warranty of neutrality, will be conclusive evidence of the breach thereof, (s) unless it appears on the face of such sentence that the grounds of the adjudication are erroneous, or the adjudication itself is involved in doubt and ambiguity. (t) It has been held that an American by birth, who has resided for some years with his family in England, going occasionally to America, is so far to be considered a British subject that, if a ship of his be warranted American property, it is not to be deemed so, though the vessel was built in America and registered there. (u)

Fraudulent Misrepresentation.³¹—Oral evidence of representations and statements made at the time the policy was effected is inadmissible in evidence to control, alter, or affect the liability upon the policy, unless they are fraudulent representations. (x)¹ All material statements and representations which are false to the knowledge of the party making them, are fraudulent, and may be proved by oral testimony, in order to deprive the plaintiff of his right of action upon the contract. (y) The misrepresentation will be of a material fact, and will avoid the policy if it be an assertion in time of war that the ship will sail with convoy or in company with other vessels, and carry a certain force. (z) If the representation is true in substance, the policy will not be avoided, although it may be incorrect in minor

¹ 1 Para. Mar. Ins. c. 13; 1 Phillips, Ins. c. 7; Hine & Nichols, New Dig. Ins. 554; Sansum, Dig. Ins. 1196; U. S. Dig. tit. *Insurance*, sect. 797.

(g) *Saloucci v. Johnson*, 2 Park. Ins. 407; 7 Bing. 504; *Hobbs v. Henning*, 716. *supra*.

(r) *Hobbs v. Henning*, 34 L. J. C. P. 117; 17 C. B. n. s. 791; and see *Chavasse, Ex parte*, 34 L. J. Bk. 17. (u) *Tabbs v. Bendelack*, 3 B. & P. 207, n.

(s) *Bolton v. Gladstone*, 5 East, 155; (y) *Post*, pp. *1173, *1174; *Macdowall v. Fraser*, 1 Doug. 260. (z) *Edwards v. Footner*, 1 Campb.

(t) *Dalgleish v. Hodgson*, 5 M. & P. 530.

³¹ See Appendix, Vol. III.

details; nor will the policy be avoided if it is merely a representation of the parties' own expectation, opinion, and belief; or if it is immaterial and does not affect the risk; or if the insurer has not been deceived; or if it is made concerning facts which lie as much within the knowledge of the insurer as the insured, and the party making the representation believes it to be true at the time it is made. (a) But if the underwriter has been thrown off his guard, and prevented from making those inquiries which he would otherwise have made, the insured will be precluded from suing upon the policy, although the means of information may be within reach of the underwriter. (b) A fraudulent misrepresentation made to the first underwriter in a material point affecting the risk, is considered as [* 687] * a misrepresentation to every underwriter who underwrites the policy after him, because the obtaining of the signature of the first underwriter weighs with the others and induces a misplaced confidence; but a misrepresentation to an intermediate underwriter has been held not to extend to the others. (c)

Concealment³² of circumstances materially affecting or enhancing the risk to be incurred by the insurer or underwriter avoids all policies of assurance, and prevents the insured from recovering, even in respect of a loss wholly unconnected with the circumstance concealed. (d)¹ The rule is that *all facts* should be disclosed which are material to enable the underwriter to judge whether he shall accept the risk, and at what rate, not that merely facts should be disclosed which are material to the risk. (e) Thus the non-disclosure of the fact that goods are

¹ Hine & Nichols, New Dig. Ins. 153; Sansum, Dig. Ins. 235; U. S. Dig. tit. Insurance, sect. 814; 1 Pars. Mar. Ins. c. 14; 1 Phillips, Ins. c. 7, sects. 531, 537, 667.

(a) Driscoll v. Passmore, 1 B. & P. 204; Hubbard v. Glover, 3 Campb. 313; Bowden v. Vaughan, 10 East, 415; Flinn v. Headlam, 9 B. & C. 693; *post*, p. *1173.

(b) Mackintosh v. Marshall, 11 M. & W. 116; *post*, p. *1174.

(c) Barber v. Fletcher, 1 Doug. 306; Sibbald v. Hill, 2 Dow, 266; Forrester

v. Pigou, 1 M. & S. 13; Bell v. Carstairs, 2 Campb. 543.

(d) Seaman v. Foneran, 2 Str. 1183; Fitzherbert v. Mather, 1 T. R. 12; Hodgson v. Richardson, 1 W. Bl. 463; Traill v. Baring, 33 L. J. Ch. 521; *post*, pp. *994, *995.

(e) Rivaz v. Gerussi, 6 Q. B. D. 222.

insured greatly in excess of their value will avoid the policy. (*f*) The keeping back of any such circumstance avoids the policy, although the suppression may have occurred through mistake, "because the underwriter is deceived, and the risk run is really different from the risk understood and intended to be run at the time of the agreement." (*g*) A person proposing a marine insurance is bound to communicate every fact within his knowledge that is material, though if a particular fact be actually or personally known to the underwriter at the time, he cannot afterward set up as a defence to an action on the policy that that fact was not communicated; but if a material fact be not communicated which, though known to the underwriter once, was not present to his mind at the time of effecting the insurance, the non-communication affords a good defence to the underwriter; and it is not enough for the insured to show that the particulars supplied by him, coupled with the underwriter's previous knowledge, would, if the underwriter had given sufficient consideration to the subject, have brought to his mind the material fact not communicated. (*h*) In the case of a time policy, if the insured wilfully permits the ship to sail, or knows that it has sailed, on the voyage of which the time policy covers part, in an unseaworthy state, the insurance will be void on the ground of the concealment of a material circumstance. (*i*) If the assured has received a doubtful account of the loss of his ship, *such as "that a ship similar to his has [* 688] been captured," and neglects to disclose the intelligence to the underwriter, the policy will be void; (*k*) and so it will if the assured keeps back any fact which, if disclosed, would in all probability have caused the underwriter to charge a higher premium; (*l*) such as that the captain's judgment in the navigation of the vessel has been fettered and restricted by some unusual private instructions, (*m*) or that the ship is a missing ship out

(*f*) *Ionides v. Pender*, L. R. 9 Q. B. 471.

(*g*) *Carter v. Boehm*, 3 Burr. 1910; *Mercantile Steam Ship Co. v. Tyser*, 7 Q. B. D. 73; *post*, p. *995.

(*h*) *Bates v. Hewitt*, L. R. 2 Q. B. 595.

(*i*) *Parke, B., Gibson v. Small*, 4 H. L. C. 408.

(*k*) *Da Costa v. Scandret*, 2 P. Wms. 169.

(*l*) *Willes v. Glover*, 1 B. & P. N. R.

16. (*m*) *Middlewood v. Blakes*, 7 T. R. 162.

of her time, (*n*) or that she had encountered tempestuous weather, and that another ship that sailed long before her had arrived, (*o*) or that she had taken the ground or struck on a rock at an antecedent period, and had not been since surveyed or repaired, (*p*) or that she had been met at sea in a leaky state, (*q*) or had missed joining convoy and been driven out to sea, (*r*) or that hostile privateers had been seen in pursuit of her, (*s*) or that she was intended to be employed in a foreign smuggling transaction, or to carry simulated papers. But the insured or the party effecting the policy is not bound to disclose "loose rumors gathered together no one knows how," (*t*) nor matters which lie as much within the knowledge of the underwriter as of the party effecting the insurance, nor such things as it is the business of the underwriter to know or find out for himself; such as the ordinary risks attendant upon particular speculations or adventures, the usages of trade, the dangers of particular seas and rivers, the probability of hostilities between different foreign states, nor the build, age, history, or capabilities of the ship, although, if questions are put to him upon any of these points, he is bound to answer to the best of his information and belief, and if he knowingly states that which is false, he is guilty of a fraudulent misrepresentation which avoids the policy. (*u*) The insured is not bound to disclose to the underwriter the time of the ship's sailing, or to say whether she has sailed or not, unless the ship is a missing ship. "If the underwriter wants to know, he ought to inquire." (*x*) If the insured, at the time he effects the insurance, knows that the loss insured against has taken place, this is obviously a downright fraud, which avoids the policy; but if he does not know of the loss, the validity

- (*n*) *M'Andrew v. Bell*, 1 Esp. 373. (*r*) *Sawtell v. London*, 5 Taunt. 359.
 (*o*) *Kirby v. Smith*, 1 B. & Ald. 672; (*s*) *Beckwaite v. Nalgrove*, cited 3
Elton v. Larkins, 8 Bing. 198; *Bridges* Taunt. 41.
v. Hunter, 1 M. & S. 20. (*t*) *Durrell v. Bederloy*, Holt, N. P.
 (*p*) *Gladstone v. King*, 1 M. & S. 35; 285.
Russell v. Thornton, 4 H. & N. 788; 6 (*u*) *Carter v. Boehm*, 3 Burr. 1915;
 H. & N. 140; 30 L. J. Ex. 69; *Holland* *Haywood v. Rodgers*, 4 East, 597; *Free-*
v. Russell, 4 B. & S. 14; 32 L. J. Q. B. *land v. Glover*, 7 East, 464; *Harrower*
 297. *v. Hutchinson*, L. R. 5 Q. B. 584.
 (*q*) *Lynch v. Hamilton*, 3 Taunt. 37; (*x*) *Fort v. Lee*, 3 Taunt. 381.
Lynch v. Dunsford, 14 East, 494.

* of the insurance will depend upon the terms of the [* 689] particular policy. If the insurance is on goods alleged to be on board a particular vessel, and no such goods or vessel exist at the time the policy is effected, the contract is nugatory, and the risk upon it never attaches. But if the policy is on goods "lost or not lost," the indemnity extends, as we have before seen, to all past as well as future losses. If an agent whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship or cargo, purposely omits to discharge this duty, and the principal, being thus left in ignorance of a fact material to be communicated to the underwriter, effects an insurance, the insurance is void on the ground of concealment; (y) and the agent ought to communicate with the principal by electric telegraph, where that means of communication is in general use. (z) Where the agent innocently omits his duty in this respect, the policy is not void. (a) But when the slip has been initialed, the insured need not communicate to the underwriters facts which come to his knowledge afterward, but before the policy is completed. (b)

Although it is fraud in an insurer to insure a vessel which he knows to be lost, yet if an insurance has been effected before the loss but without his authority, he may ratify such insurance, although he knows of the loss. (c)

Of the Risks covered by the Policy¹ — **Custom and Usage.** — Everything done in the usual course of navigation and trade is presumed to have been foreseen and in contemplation by the parties to every contract of insurance at the time they entered into the engagement.³³ Therefore where a vessel engaged in the China trade was heeled down in an estuary, to be cleaned and

¹ Hine & Nichols, *New Dig. Ins.* 562; 1 *Par. Mar. Ins.* c. 17; 1 Phillips, *Ins.* c. 13; U. S. *Dig. tit. Insurance*, sect. 1001; Sansum, *Dig. Ins. tit. Policy*, X, XI.

(y) *Fitzherbert v. Mather*, 1 T. R. 12, 16; *Gladstone v. King*, 1 M. & S. 35. These decisions have been dissented from by Mr. Justice Story, *Riggles v. General Interest Insurance Co.* (4 Mason's Rep. 74), but have been upheld in *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511; 36 L. J. Q. B. 225.

(z) *Proudfoot v. Montefiore*, *supra*.

(a) *Stribley v. Imperial Marine Insurance Co.*, 1 Q. B. D. 507.

(b) *Cory v. Patton*, L. R. 7 Q. B. 304; 41 L. J. Q. B. 195, n.; *Lishman v. The Northern Maritime Insurance Co.*, L. R. 8 C. P. 216; 42 L. J. C. P. 108.

(c) *Williams v. North China Ins. Co.*, 1 C. P. D. 757, C. A.

³³ See Appendix, Vol. III.

refitted for the return voyage to England, and the tackle was put on a sandbank and there accidentally burnt, and it was shown to be customary for vessels in that trade and engaged in that particular navigation to refit and prepare for the home voyage in the same manner, it was held that the insurer was bound to make good the loss. (d) If the policy is effected on the ship, tackle, boats, and furniture, and it is the custom to sling boats over the quarter outside the ship, the underwriter will be responsible for a boat lost by being so slung; [* 690] * for every underwriter is presumed to be acquainted with the practice of the trade he insures, and "if he does not know, he ought to inform himself." (e) If liberty of "unloading and re-shipping" is expressly given by the policy, that must be taken to mean an unloading and re-shipping according to the usage of the trade; and, therefore, if it is the custom to put goods on board a store-ship to await the arrival of a vessel into which they can be re-shipped, and the goods are lost in such store-ship, the underwriters will be responsible. (f) If it is the custom for vessels insured "to depart with convoy," to sail from the loading port without convoy to the general place of rendezvous for ships wanting convoy, and a vessel is captured whilst proceeding thither unaccompanied, to obtain convoy in the customary mode, the underwriters will be responsible for the loss. (g)

Deck Cargoes.¹ — If it is the known custom of the captains and masters in any particular trade to carry deck cargoes, and such a cargo is insured and washed overboard, the underwriter will be bound to make good the loss; but as goods thus carried are exposed to greater hazard than goods carried in the ordinary way, they will be discharged from liability unless the custom is

¹ 1 Pars. Mar. Ins. 529; 1 Phillips, Ins. sects. 460, 1282; U. S. Dig. tit. *Insurance*, 1064; Hine & Nichols, New Dig. Ins. 145 b, 423, sect. 41; 706, sect. 40; 240 c; 700, sect. 18; Sansum, Dig. Ins. 394.

(d) *Pelly v. Royal Ex. Ass. Co.*, 1 Burr. 341. (f) *Tiernay v. Etherington*, cited 1 Burr. 346.

(e) *Blackett v. Royal Ex. Ass. Co.*, 2 C. & J. 249; *Noble v. Kennoway*, 2 Doug. 513. (g) *Gordon v. Morley*, 2 Str. 1265; *Warwick v. Scott*, 4 Campb. 62.

clearly established or the underwriters have express notice of the increased risk. (*h*) But as a rule deck cargoes jettisoned are not entitled to general average contribution. (*i*) By the 16 & 17 Vict. c. 107, sects. 170–172 (see also 39 & 40 Vict. c. 80, sects. 13, 24, and 43 & 44 Vict. c. 43), deck cargoes are prohibited at certain periods of the year in vessels sailing from British ports in North America. A policy of insurance, therefore, entered into for the express purpose of protecting what the law has prohibited will be invalid; (*k*) but the statute does not make the voyage absolutely illegal, so as to affect innocent persons. It must be shown that the policy was effected with full knowledge by the insured that the goods were to be placed on deck, and that the vessel was to sail during the prohibited period; and the knowledge of the ship-master is not the knowledge of the ship-owner. (*l*) A custom that underwriters are not liable under the ordinary form of policy for general average in respect of the jettison of goods stowed on deck, is a valid custom, and does not contradict the terms of the policy. (*m*)

*** Intermediate Voyages — Custom and Usage.**³⁴ — On [* 691] fishing voyages to the American seas, it is customary for vessels, after the termination of the outward voyage, to be employed in banking or fishing off the coasts of Newfoundland before they return; and if a vessel is insured for the outward and homeward voyage, the insurance will cover and protect the vessel during the intervening period occupied by fishing, if she is not detained longer than is customary and usual. (*n*) If it is the custom, when several empty vessels arrive together at the port of lading and cannot all find cargoes, to employ some of them on a short intermediate voyage, and a vessel insured for the outward and homeward voyage is so employed, and then takes on board her return cargo and is lost on the homeward

(*h*) *Milward v. Hibbert*, 3 Q. B. 120; 27 L. J. Q. B. 408; *Wilson v. Rankin*, *Miller v. Titherington*, 30 L. J. Ex. 217; 34 L. J. Q. B. 66; 6 B. & S. 208; 35 L. J. Ex. 363; 6 H. & N. 278; 7 H. J. Q. B. 87; L. R. 1 Q. B. 162; *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581.

(*i*) *Wright v. Marwood*, 7 Q. B. D. 62; see *ante*, p. *515.

(*k*) *Cunard v. Hyde*, 29 L. J. Q. B. 6; 2 El. & El. 1.

(*l*) *Cunard v. Hyde*, E. B. & E. 670;

(*m*) *Miller v. Tetherington*, 7 H. & N. 954; 31 L. J. Ex. 363.

(*n*) *Vallance v. Dewar*, 1 Campb. 503.

³⁴ See Appendix, Vol. III.

voyage, the liability of the underwriters in respect of the loss will not be discharged; but a usage for the employment of the vessel for an unreasonable or unnecessary space of time will not be sanctioned. (*o*) Where a ship was insured "at and from Bengal to any ports or places whatsoever beyond the Cape of Good Hope, forwards and backwards, and during her stay at each place, until her arrival at London," and it was proved to be the notorious usage of the East India trade to detain vessels in the Indian seas for a reasonable period, extending to several months, for the purpose of employing them on intermediate country voyages in those seas before they make the return voyage to Europe, it was held that the underwriters must be deemed to have contracted with reference to the known usage, and that the customary intermediate voyage was covered and protected by the policy. (*p*) The usages established amongst the underwriters at Lloyd's cannot affect their liability upon the policy, unless it be shown that the assured was cognizant of them, or was in the habit of transacting business at Lloyd's. (*q*)

Loss by Perils of the Seas¹ — **Negligence and Misconduct of the Master or Mariners.**³⁵ — The risks that the underwriters generally take upon themselves by the common form of policy are perils of the sea, fire, pirates, letters of mart and counter-mart, takings at sea, restraint of princes and people, barratry of the masters and mariners, &c. We have already seen that, as between the carrier of goods by sea and the owner of such goods, losses which, though caused immediately by the violence of the winds and waves, are imputable to the ignorance or negligence of the master or mariners, are not losses by perils of the sea (*ante*, p. *497); but a different rule prevails in cases of [*692] insurance, where the immediate * and not the remote cause of loss is regarded, so that if a vessel is stranded

¹ 1 Pars. Mar. Ins. c. 17, sect. 2; 1 Phillips, Ins. c. 13, sect. 8; U. S. Dig. tit. Insurance, sect. 1058; Hine & Nichols, New Dig. Ins. 391; 350, sects. 2, 3; 225, sect. 8; Sansum, Dig. Ins. tit. Policy, X.

(*o*) Ougier v. Jennings, 1 Campb. 505, n. (a); Phillips v. Irving, 8 Sc. N. R. 7. (*p*) Salvador v. Hopkins, 3 Burr. 1707.

(*q*) Scott v. Irving, 1 B. & Ad. 605; Gabay v. Lloyd, *ante*, p. *205.

and wrecked through the incompetency or misconduct or barratry of the captain and crew, the loss is nevertheless, as between the insurer and the insured, a loss by perils of the sea, and is covered by the policy, provided the insured, if the insurance is on the vessel itself, had appointed a sufficient crew, and a captain who appeared to have competent skill at the commencement of the voyage. (r) And generally a loss caused immediately by perils of the sea is within the policy, though it might not have occurred but for the concurrent action of some other cause which is not within the policy. (s) If by reason of the wilful extinguishment of a particular light by a hostile force, the captain miscalculates his position and the ship goes ashore, the loss is a loss by perils of the sea, although it might never have occurred if hostilities had not broken out. (t) And if a ship is wrecked on a foreign coast, and the cargo gets into the hands of the authorities there, and the owners, in order to recover it, are compelled to pay a sum of money to such authorities, the loss of that sum, being an immediate consequence of the wreck, is a loss by perils of the sea. (u) A loss occasioned by another vessel's running down the ship insured is a loss by perils of the sea, although there has been negligence and want of skill on the part of the master and crew of the ship insured. (x) If in the collision both vessels are injured, and the owners are compelled by the rules of the Court of Admiralty to divide the loss, and the ship insured has done more damage than she has received, and the owners are obliged to pay the balance, this is not then a loss by perils of the sea, as the sea is not the proximate cause thereof: "it grows out of an arbitrary provision in the law of nations from views of general expediency, and can no more be charged upon the underwriters than a penalty incurred by contravention of the revenue laws of any particular state, which was rendered inevitable by perils insured against." (y) If a ship takes the

(r) *Redman v. Wilson*, 14 M. & W. 483.

(s) *Dudgeon v. Pembroke*, 2 Ap. Cas. 284; *West Indian Teleg. Co. v. Home Ins. Co.*, 6 Q. B. D. 51.

(t) *Ionides v. Univ. Marine Ins. Co.*, 14 C. B. N. s. 259; 32 L. J. C. P. 170.

(u) *Dent v. Smith*, L. R. 4 Q. B. 414; 38 L. J. Q. B. 144.

(x) *Smith v. Scott*, 4 Taunt. 126.

(y) *De Vaux v. Salvador*, 4 Ad. & E. 420.

ground on entering or leaving port, the loss is, as we have before seen, a loss by perils of the sea; but if she is hove down on a beach within the tideway, or placed in a graving-dock to be repaired or cleaned, and rolls over or is blown over by the wind, and is bilged or damaged, the loss is not a loss from perils of the sea, for the sea is not in such a case the proximate cause of the mischief. (z)

[* 693] * The collision clause now frequently inserted in policies, to secure the shipowner against damage which he may be compelled to pay for injury done to others by his vessel coming into collision with another, does not extend to damages paid by the insured in respect of loss of life or personal injury. (a) Nor does it cover the extra costs which the insured may be put to when he is sued for damages for a collision but gets a verdict, nor can these costs be recovered under the suing and laboring clause. (b)

Sea Risks covered by the Policy.³⁶—Loss or damage resulting from ordinary wear and tear, or from some inherent vice or defect, (c) is not covered by the policy. There must be something fortuitous or accidental in the nature of the damage. (d) Therefore, where a vessel moored in a river, waiting her turn to discharge her cargo, floated when the tide was in and took the ground when the tide was out, and so remained for several days, when she became hogged or strained, and the cabin doors would not shut, and she was obliged to go into dock to be thoroughly repaired, it was held that there was nothing in the disaster which could be referred to the perils insured against. The tide rose and fell as the tide always does; there was no *casus fortuitus*; and the underwriters were not answerable. (e) If a vessel founders at sea in consequence of her hull having been eaten into by worms during the voyage, the loss is a loss by perils of the sea, as the sea is the proximate cause of the mis-

(z) *Thompson v. Whitmore*, 3 Taunt. 227; *Phillips v. Barber*, 5 B. & Ald. 161. See *Davidson v. Burnand*, L. R. 4 C. P. 117.

(a) *Taylor v. Dewar*, 5 B. & S. 58; 33 L. J. Q. B. 141.

(b) *Xenos v. Fox*, L. R. 4 C. P. 665.

(c) *Byles, J., Koebel v. Saunders*, 17 C. B. n. s. 79; 33 L. J. C. P. 312.

(d) *Paterson v. Harris*, 1 B. & S. 336; 30 L. J. Q. B. 354.

(e) *Magnus v. Buttemer*, 11 C. B. 876; 21 L. J. C. P. 119; *Corcoran v.*

Gurney, 1 Ell. & Bl. 456.

chief. But if the vessel get safe to some intermediate port at which she was authorized to touch, and is then unable to put to sea again in consequence of the ravages made in her hull by the worms, or in consequence of her bottom having been eaten into by rats while she was lying in port, the loss is not a loss from perils of the sea, but a loss from the ravages of worms and rats, as the worms and the rats are then the proximate, and not the remote, cause of the mischief. (*f*)

Losses from Old Age and Decay, and Other Causes — Perils of the Sea.³⁷ — If a vessel is old, and her timbers decay during the voyage, and the bolts and fastenings become loosened, and she founders in a gale of wind which a younger and stouter vessel would in all probability have ridden out in safety, the loss is a loss by perils of the sea; (*g*) but if she gets safe into port and there drops to pieces, or is found to be unfit to go to sea again from age and decay, the loss is not a loss from perils of the sea, but from old age.

* Where a policy was effected on merchandise laden [* 694] on board a vessel, and the ship was disabled in a storm and obliged to put into port to refit, and the master, in order to defray the expense, sold part of the goods, and applied the proceeds in payment of such expense, it was held that, as it was want of funds *aliunde* which obliged the captain to have recourse to a sale of the goods, the loss was not a loss from a peril of the sea. (*h*) Where a vessel went ashore and was wrecked in consequence of two of the crew being seized and carried off by a press-gang whilst they were making fast a line to the quay, it was held that, as the immediate cause of the loss was the stranding of the vessel, it was a loss by perils of the sea within the meaning of the policy of insurance, although it had been brought about and occasioned by the press-gang. (*i*) If a cargo of living animals is insured "free from mortality and jettison," and the beasts are killed by the rolling of the ship in a storm, the underwriter is nevertheless liable, as the exception

(*f*) *Hunter v. Potts*, 4 Campb. 204.

(*g*) *Phillips v. Nairne*, 4 C. B. 358.

(*h*) *Powell v. Gudgeon*, 5 M. & S.

437; *Sarqy v. Hobson*, 2 B. & C. 7. 336.

In such a case the owner of the goods

must resort to the shipowner for an indemnity against the loss; *ante*, p. * 494.

(*i*) *Hodgson v. Malcolm*, 5 B. & P.

³⁷ See Appendix, Vol. III.

extends only to death from natural causes, and the death in such a case arises immediately from a peril of the sea. (*k*) If a cargo of hides has been insured, and the upper portion of the cargo has been injured from putrefying exhalations arising from the decomposition of the lower hides occasioned by the action of sea water, the injury to the upper hides is a loss occasioned by perils of the sea; and if the cargo consists partly of corn or tobacco and partly of hides, and the sea water renders the hides putrid, and the putridity of the hides injures the corn or the tobacco, such injury constitutes a loss by perils of the sea. (*l*) But the insurer is not responsible for loss arising from damage to the reputation of goods from suspicion of injury by salt water where they have not in fact been so injured. (*m*) If a cargo of hemp or cotton is put on board in a damp and dangerous state, and it ferments and catches fire or becomes damaged, this is not a loss by perils of the sea, but from an inherent defect in the article itself; (*n*) nor is it a loss by perils of the sea where meat is spoiled by reason of mere delay occasioned by stormy weather. (*o*) A loss from capture or robbery by pirates is a loss by "perils of the sea." (*p*) If a ship is captured and taken in tow by a man-of-war, and is thereby exposed to a tem-
 [* 695] pestuous sea which injures goods on * board, the loss may be treated either as a loss by perils of the sea or as a loss by capture. (*q*) If a vessel has sailed out of port on her intended voyage, and does not arrive at her port of destination within a reasonable period, and no intelligence can be obtained respecting her, this is evidence of the loss of the vessel from perils of the sea. (*r*) Where one of the risks insured against was "all risks incident to steam navigation," and by failure of machinery the ship was detained so long that the charterers cancelled their charter-party under the terms contained in it, it

(*k*) *Lawrence v. Aberdeen*, 5 B. & Ald. 107.

(*o*) *Taylor v. Dunbar*, L. R. 4 C. P. 206.

(*l*) *Montoya v. Lond. Ass. Co.*, 6 Exch. 451.

(*p*) 2 Roll. Abr. 248, fol. 10.

(*m*) *Cator v. Gt. Western Insurance Co. of New York*, L. R. 8 C. P. 552.

(*q*) *Hagedorn v. Whitmore*, 1 Stark. 157.

(*n*) *Boyd v. Dubois*, 3 Campb. 132; *Byles, J., Koebel v. Saunders*, 17 C. B. n. s. 79; 33 L. J. C. P. 312.

(*r*) *Green v. Brown*, 2 Str. 1199; *Koster v. Reed*, 6 B. & C. 19.

was held that the loss was occasioned by such cancelling, and not by the breaking down of the machinery. (s)

Perils of Fire¹ and Jettison.²³⁸—When fire is one of the perils insured against, “and the ship is lost by fire, it is of no consequence whether this was occasioned by a common accident, or by lightning, or by an act done in duty to the state,” to prevent the vessel from falling into the hands of the enemy, (t) or by the gross negligence of the captain or crew. (u) “Fire is still the *causa causans*; and the loss is covered by the policy.” Where a vessel insured against fire was described in the policy as “lying in the Victoria Dock, with liberty to go into a dry dock,” it was held that the ship was not covered by the policy whilst she was lying in the Thames not *in transitu* to the dry dock. (v) When jettison is one of the risks insured against, the policy will cover a loss occasioned by the throwing of the goods overboard to prevent their falling into the hands of the enemy. (x) It is not an implied condition that the insured on goods must claim contribution of the other parties for a jettison before he can demand indemnity from his underwriters. He may demand it of them in the first instance; and when the underwriters have paid him, they will be entitled to stand in his place with respect to the general average contribution. (y)

Loss by Capture and Seizure.²³⁹—Where an insurance was effected against capture only, and the vessel was driven on the enemies’ coast in a stiff gale of wind, but received no damage, and whilst she remained stranded on the shore she was seized

¹ 1 Pars. Mar. Ins. 558; 1 Phillips, Ins. 629; Sansum, Dig. Ins. tit. *Policy*, particularly sects. 1021, 1023, 1030; Hine & Nichols, New Dig. Ins. 151; U. S. Dig. tit. *Insurance*, sect. 1104.

² 2 Pars. Mar. Ins. 156; 2 Phillips, Ins. 65; U. S. Dig. tit. *Insurance*, sect. 1513; ib. tit. *Shipping*, sect. 914; Sansum, Dig. Ins. 607, 619; Hine & Nichols, New Dig. Ins. 240 e, 700, sect. 18.

³ 1 Pars. Mar. Ins. 575; 1 Phillips, Ins. 652; U. S. Dig. tit. *Insurance*, sects. 1090, 1230; Sansum, Dig. Ins. 217.

(s) *Merc. Steam Ship Co. v. Tyser, Co.*, 33 L. J. C. P. 85; 15 C. B. n. s. 7 Q. B. D. 73. 304; L. R. 8 C. P. (Ex. Ch.) 548; 42 L.

(t) *Gordon v. Rimmington*, 1 Campb. J. C. P. (Ex. Ch.) 548; 1 Ap. Cas. 498. 123. (x) *Butler v. Wildman*, 3 B. & Ald.

(u) *Busk v. Royal Ex. Ass. Co.*, 2 B. 398.

& Ald. 73. (y) *Dickenson v. Jardine*, L. R. 3

(v) *Pearson v. Commercial Un. Ass.* C. P. 639.

38, 39 See Appendix, Vol. III.

and confiscated, it was held that this was a loss by capture. (z)

But if the vessel had been disabled or totally wrecked, [* 696] it would have been a loss *from perils of the sea. (a)

The circumstance that the capture has been occasioned by the barratry of the master, or that it is an illegal capture, does not render the capture less a capture. (b) As insurances on voyages to ports blockaded by a British squadron are illegal, no action can be maintained for indemnity in respect of losses resulting from an attempt to break such a blockade, if it appears that the party bringing the action knew of the blockade and intended to break it at the time he effected the insurance. If he had no knowledge of the blockade or no intention to break it, or had fair ground to think that the blockade would be raised by the time the vessel reached her destination, the insurance will be valid. (c) Insurances by British subjects of foreign vessels and cargoes from capture do not extend to captures made by order of the government of this country; for all insurances of enemies' property against *British* capture are null and void, as being contrary to the public policy of the law. (d) And in every policy of insurance there is an implied term or proviso that the insurance shall not extend to cover any loss from capture of enemies' property by the British government on the breaking out of hostilities. (e) But the property of neutrals will be covered and protected by the policy; (f) and so will the property of all persons who have received a license to trade from the crown. (g) If a foreigner consigns goods to merchants in this country on his own account and risk, and the consignees make advances to such foreign consignor in respect of the consignment, and insure the goods on his account, and a war breaks out which prevents the consignor from suing upon the policy in the courts of this country, the consignees cannot avail them-

(z) *Green v. Elmslie*, Peake, 278.

(a) *Hahn v. Corbett*, 2 Bing. 205; *Ionides v. Universal Marine Ins. Co.*, ante, p. * 692.

(b) *Arcangelo v. Thompson*, 2 Campb. 621; *Powell v. Hyde*, 5 Ell. & Bl. 611; *Palmer v. Naylor*, 10 Exch. 382; 23 L. J. Ex. 323; *Cory v. Burr*, 8 Q. B. D. 313; 9 Q. B. D. 463.

(c) *Harratt v. Wise*, 9 B. & C. 712;

Naylor v. Taylor, ib. 718.

(d) *Furtado v. Rogers*, 3 B. & P. 191; *Esposito v. Bowden*, 7 El. & Bl. 763.

(e) *Brandon v. Curling*, 4 East, 417; *Kellner v. Le Mesurier*, ib. 396.

(f) *Visger v. Prescott*, 5 Esp. 186.

(g) *Usparicha v. Noble*, 13 East, 332.

selves of the policy for the purpose of recovering the amount of their advances from the underwriters, although it was made in their names as interest might appear. They should have insured their interest in the first instance. (*h*) When a capture has been made, whether legal or not, the underwriters are liable for the expenses of a compromise made *bona fide* to prevent the ship's being condemned as a prize. (*i*) If the capture does not take place until after the goods have been landed, the underwriters are not liable, as the voyage is terminated, although the goods may never have come to the possession of the consignees. (*k*)

*** Restraints and Detainments of Kings, Princes, and [* 697] People.¹**—The word "people" comprehends nations in their collective capacity, and not bodies of insurgents acting in opposition to their rulers. "It means the supreme power of the country, whatever it may be;" and therefore if a corn vessel is seized and detained by a hungry mob or a party of rebels, the loss resulting therefrom is not covered by the policy, for it is not a detention by "the people." (*l*) But if it be made by order of the executive officers of a foreign government, or by any foreign prince, potentate, or power, it is otherwise. (*m*) The clause does not extend to losses by detention by the British government, or by officers acting under its authority, unless the detention be unlawful. A foreigner, therefore, cannot sue any British subject in the courts of this country for such losses, (*n*) unless he can show that it was an erroneous or unlawful detention. (*o*) The insurance against the risk of detention by princes will not extend to cover any loss happening in the course of any contraband adventure in which the goods become liable to seizure as forfeited by the laws of this country, (*p*) or by the laws of any foreign country, unless the underwriter has notice.

¹ See *ante*, p. * 695, American note 3.

(*h*) *Conway v. Gray*, 10 East, 536; (*m*) *Rotch v. Edie*, 6 T. R. 413.
but see *Aubert v. Gray*, 3 B. & S. 163; (*n*) *Touteng v. Hubbard*, 3 B. & P.
32 L. J. Q. B. 50. 291.

(*i*) *Berens v. Rucker*, 1 W. Bl. 313. (*o*) *Mullet v. Shedden*, 13 East, 304;
(*k*) *Brown v. Carstairs*, 3 Campb. 160. *Lozano v. Janson*, 28 L. J. Q. B. 337;
(*l*) *Nesbitt v. Lushington*, 4 T. R. 2 El. & El. 60.

783. (*p*) *Brandon v. Curling*, 4 East, 416.

of the intention of the insured to engage in a foreign smuggling transaction and accepts the increased risk, in which case he will be liable upon the policy, as our courts do not take notice of the revenue laws of foreign governments. (*q*) If the detention arises from the captain's having carried simulated papers, or from his having neglected to provide proper national documents for his vessel, the underwriters will be discharged, (*r*) unless they have received notice of the intention so to trade, and have accepted the increased risk, and the trading with simulated or defective papers is not unlawful by the laws of this country, but is resorted to in the furtherance of British commerce. (*s*) A detention from fear of an embargo at the port of destination is not a detention within the meaning of the policy. And if by reason of a hostile embargo suddenly laid on the destined port, the further prosecution of the voyage becomes impracticable, and the ship returns and the voyage is lost, the loss is not a loss by restraint or detainment. (*t*) Goods are restrained or detained where they are by the application of a hostile force prevented from being carried to their destination, as where they are in a blockaded port or a besieged town. Thus where goods insured from Shanghai to London *via* Marseilles [* 698] * arrived at Paris, but that city was immediately afterward so completely surrounded and invested by the German armies, who were then besieging it, that it was impossible to remove the goods from it, it was held that there was a loss by "restraint of princes," and that the insured was justified in abandoning the goods. (*u*) Every foreigner is deemed to be a party to the public authoritative acts of his own government, and a detention by order of such government is as much his act as if it proceeded immediately from himself. He cannot, therefore, make a loss resulting from such a detention the foundation of a claim for indemnity against any British subjects in the courts of this country, (*x*) unless the insurance is expressly directed against such a contingency, and the insurer

(*q*) *Planché v. Fletcher*, 1 Doug. 251;
Holman v. Johnson, 1 Cowp. 343.

(*r*) *Bell v. Carstairs*, 14 East, 374.

(*s*) *Bazett v. Meyer*, 5 Taunt. 824.

(*t*) *Forster v. Christie*, 11 East, 205.

(*u*) *Rodocanachi v. Elliott*, L. R. 8
 C. P. 649; 9 C. P. 518.

(*x*) *Campbell v. Innes*, 4 B. & Ald.

423; but see *Aubert v. Gray*, 32 L. J.

Q. B. 50; 3 B. & S. 163.

has expressly agreed to take upon himself such a risk. (y) If the detention of goods takes place whilst they are on board the vessel at the port of destination, before the risk in the policy ceases, the underwriters are responsible; but if the goods have been safely landed and are then seized, they are discharged from liability. (z) The underwriters are sometimes exempted, by the express terms of the policy, from responsibility in case of confiscation, seizure, and capture in port. In these cases, whether the vessel was or was not at her port of discharge, is a question of fact for a jury, to be determined by reference to custom and usage, as defining the limits of the port. (a)

Peril of Barratry of the Master and Crew.^{1 40} — Barratry, a term derived from the Italian word *barrattare*, to cheat, may be defined to be any species of fraud or cheating by which the owners or insurers are injured, (b) such as running away with the ship; or fraudulently carrying her out of her course; or sinking or deserting her; or fraudulently defeating or delaying the voyage; embezzling the cargo; smuggling; (c) cruising for and taking prizes without the sanction and authority of the owner; (d) sailing out of port without paying port dues, or in breach of an embargo, whereby the vessel or cargo is confiscated or lost; trading with alien enemies; or wilfully and knowingly sailing to a blockaded port, whereby the ship is seized by a British cruiser. (e) And the act may be barratry, although it was done by the captain with no view of benefiting *him- [* 699] self, but of securing some advantage for the shipowners.

But barratry does not in our own law include simple negligence, unaccompanied by culpable misconduct, nor any act done in obedience to the commands of the shipowner, or from ignorance,

¹ See 1 Pars. Mar. Ins. 566; 1 Phillips, Ins. 610; U. S. Dig. tit. *Insurance*, sect. 1079; Hine & Nichols, New Dig. Ins. 110, 151, sect. 1; Sansum, Dig. Ins. 192.

(y) *Simeon v. Bazett*, 2 M. & S. 98. (c) *Dixon v. Reid*, 5 B. & Ald. 597;
(z) *Brown v. Carstairs*, 3 Campb. 160. *Hucks v. Thornton*, Holt, N. P. 30;
Roscow v. Corson, 8 Taunt. 684; *Ross v. Hunter*, 4 T. R. 33; *Havelock v. Hancil*, 3 T. R. 277.
(a) *Reyner v. Pearson*, 4 Taunt. 662; *Levy v. Vaughan*, ib. 387; *Levin v. Newnham*, ib. 722; *Mellish v. Staniforth*, 3 Taunt. 499. (d) *Moss v. Byrom*, 6 T. R. 379.
(b) *Vallejo v. Wheeler*, 1 Cowp. 154; *Earle v. Rowcroft*, 8 East, 126. (e) *Goldschmidt v. Whitmore*, 3 Taunt. 508.

⁴⁰ See Appendix, Vol. III.

or a mere error of judgment, or a mistake by the captain of the tenor of his instructions. (*f*) "Barratry," it has been observed, "is an act of fraud, not directed against the owner of the goods which are lost, but against the owner of the ship; and if the owner of the ship (he being sole owner) concurs in the act which causes the loss, it takes from it the character of barratry." But if the owner of the goods is the freighter or charterer of the vessel, and the ship is under his orders and control, he is *pro hac vice* the owner of the vessel, and the fraudulent conduct of the master and crew amounts to barratry as between him and them, although the shipowner may be a party to the fraud. A master who is a sole owner cannot commit barratry, because he cannot commit a fraud against himself; but if a master, being also part owner, makes away with the ship in fraud of the other owners, that is barratry. (*g*) Where barratry of the master was insured against, and the ship was warranted "free from capture and seizure," and the ship was seized in consequence of barratry, it was held that the loss was due to the seizure, not the barratry. (*h*)

Perils, Losses, and Misfortunes generally.⁴¹ — The clause generally inserted in policies extending the insurance to "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise and ship," &c., covers and protects all losses happening on the sea and in port, whilst the ship is in the due and customary prosecution of the voyage insured, and whilst the risk on the policy continues. If, therefore, a vessel is fired into and sunk by mistake, the loss is within this "sweeping clause" of the policy. If a vessel is lost or injured in port whilst the policy continues in force, the loss will be covered by this clause; but the general words thereof are restrained in construction to perils of the same kind as those more particularly enumerated in the policy. (*i*)

(*f*) *Todd v. Ritchie*, 1 Stark. 240; de l'équipage." — *Porn. Assurance*, No. *Stamma v. Brown*, 2 Str. 1174; *Phyn* 64.

v. Royal Ex., 7 T. R. 505; *Grill v. The* (*g*) *Jones v. Nicholson*, 10 Exch. 28; *Gen. Iron Screw Collier Co.*, L. R. 1 C. 23 L. J. Ex. 830.

P. 600; 35 L. J. C. P. 321; L. R. 3 C. (*h*) *Cory v. Burr*, *ante*, p. *696.

P. 476; in the French law, "Barraterie" (*i*) *Cullen v. Butler*, 5 M. & S. 464;

comprend toutes les espèces, tant de dol, *Phillips v. Barber*, 5 B. & Ald. 161;

que de simple imprudence, défaut de soin *Naylor v. Palmer*, 8 Exch. 739; *David-*
et impéritie tant du patron que des gens *son v. Burnand*, L. R. 4 C. P. 117.

And where meat becomes putrid by reason of delay caused by tempestuous weather, * it is not a loss within [* 700] this clause. (k) These general words will include damage by the explosion of a boiler. (l)

Of the Commencement of the Risk.^{1 42} — If the policy is on a ship or goods "lost or not lost," the indemnity extends to all past as well as all future losses. It is the same as if, the plaintiff having purchased goods at sea, the defendant, for a premium, had agreed that if the goods at the time of the purchase had sustained any damage by the perils of the sea, he would make it good. (m) Sometimes the risk is expressly appointed to commence from "the time of the vessel's being ready to sail," or "from the time of clearing," or "of her being ready for sea." When it is to commence "at and from" a particular place, it will attach immediately on her first arrival at the port in such a seaworthy condition as to be enabled to lie there in safety, although she is not safely moored, and will continue whilst she is lying at anchor preparing for the voyage for which she is insured. (n) But if there is any voluntary and unreasonable delay, the underwriter will be discharged; for his liability upon the policy is not to be subjected to the whim and caprice of a ship-owner who may choose to let his ship lie and rot at her anchors. (o) If there has been a delay in the ship's arrival at the place, it is a question for a jury whether the delay materially varied the risk; (p) and if it did, the policy did not attach. (q) But the vessel must arrive "and have once been at the place in good safety. If she arrives at the outward port so shattered as to be a mere wreck, a policy on the homeward voyage never

¹ As to the commencement, duration, and termination of the risk, see 2 Para. Mar. Ins. c. 2; 1 ib. 131; 1 Phillips, Ins. c. 11; U. S. Dig. tit. *Insurance*, sects. 1027-1057; Hine & Nichols, New Dig. Ins. 562, 678; Sansum, Dig. Ins. tit. *Policy*, II, III, XIV-XVI.

(k) *Taylor v. Dunbar*, L. R. 4 C. P. Insurance Co., L. R. 1 Ex. 206; 35 L. J. Ex. 117.

(l) *West India Teleg. Co. v. Home* (o) *Chitty v. Selwyn*, 2 Atk. 359; Ins. Co., 6 Q. B. D. 51. *Palmer v. Marshall*, 8 Bing. 79; *Smith*

(m) *Sutherland v. Pratt*, 11 M. & W. v. *Surridge*. 4 Esp. 25.

312. (p) *Hull v. Cooper*, 14 East, 479.

(q) *De Wolf v. Archangel Ins. Co.*, L. R. 9 Q. B. 451.

attaches." The safety required is a physical safety from the perils insured against, and not a freedom from political danger. (r) There is in general an express stipulation in all policies of insurance on goods and merchandise, to the effect that the risk upon the policy shall commence from the loading of the goods on board the ship. In this case, and whenever an insurance is effected on goods and merchandise laden on board a particular vessel, the risk on the policy does not commence until the goods are safely shipped and stowed on board. If they are lost by the upsetting of boats or lighters whilst they are being conveyed from the shore to the ship preparatory to the voyage, the underwriters will not be responsible for the loss. As to risk in landing from lighter after the voyage, see *post*, p. * 704.

[* 701] * Whenever by the express terms of the policy the adventure is to begin from the loading of goods on board at a particular place, the risk on the policy will not attach if no goods are taken on board at the place specified, (s) or if the vessel is lost before she arrives at the port of loading; (t) and the policy will not cover and protect goods previously taken on board, as the adventure had not commenced when those goods were received; "but this, being a strict construction, has been relaxed when there is anything on the face of the instrument to satisfy the court that the policy was intended to cover goods previously on board," (u) and, therefore, if the policy is expressed to be made in continuation of a former policy, which former policy covered and protected the antecedent cargo, the goods previously laden on board, as well as those received on board at the subsequent place of loading designated in the subsequent policy, will be protected. (x) And if the adventure is to commence on the goods "wheresoever loaded," the courts will give the words the largest signification, so as to cover all antecedent shipments. (y) Where part of an antecedent shipment was taken out at the loading port mentioned in the policy as the

(r) *Parmeter v. Cousins*, 2 Campb. 237; *Bell v. Bell*, ib. 478.

(s) *Royal Ex. Ass. Co. v. McSwiney*, 19 L. J. Q. B. 222; 14 Q. B. 661.

(t) *Halhead v. Young*, 6 Ell. & Bl. 312; 25 L. J. Q. B. 290.

(u) *Mellish v. Allnutt*, 2 M. & S. 106; *Rickman v. Carstairs*, 5 B. & Ad. 663.

(x) *Bell v. Hobson*, 16 East, 243; *Joyce v. Realm Insurance Co.*, L. R. 7

Q. B. 580; 41 L. J. Q. B. 356.

(y) *Gladstone v. Clay*, 1 M. & S. 418.

port from whence the adventure was to commence, and the whole cargo was inspected by custom-house officers for adjusting duties which were paid on it at that port, and was then put on board again with the knowledge of the underwriter, this was held to be in substance a re-loading of the whole cargo, so as to make it a cargo laden on board at the loading port mentioned in the charter-party. (z)

Of the Duration and the Termination of the Risk.⁴³ — It is generally expressly provided in the policy that the risk shall continue, as regards the ship, until she has arrived at her port of destination or port of discharge, and been moored at anchor in safety twenty-four hours, and as regards the goods, until they have been safely discharged and landed. Where a ship was insured "at and from" Jamaica, and was lost in coasting from one port of the island to another, it was held that she was protected by the policy in moving from port to port in the discharge of her cargo, and in taking fresh cargo, in the prosecution of the outward and homeward voyage in the ordinary and usual manner. (a) But a vessel is not protected in going about from port to port, or cruising round the whole island, in order to dispose of her cargo in a manner that is not *war- [*702] ranted by the ordinary usage and custom of trade, as the risk is thereby increased to the detriment of the underwriter to an extent not contemplated at the time the insurance was effected. If the policy is on the ship until her arrival at the last port of discharge, and several ports are named in the policy, some of which are blockaded, the risk on the policy will cease on the arrival of the vessel at the last unblockaded port. (b) But if the vessel deviates from the voyage insured and enters upon a fresh adventure, or goes to ports not named in the policy, through fear of the breaking out of hostilities and of the ports of destination becoming hostile ports, the underwriters will be discharged. (c) Where a ship was insured for the outward voyage "to all or any of the ports or places in the East Indies,

(z) *Nonnen v. Kettlewell*, 16 East, 188; *Carr v. Montefiore*, 33 L. J. Q. B. 57, 257; 5 B. & S. 408.

(b) *Doyle v. Powell*, 4 B. & Ad. 267.

(c) *Oliverson v. Brightman*, 8 Q. B. 781.

(a) *Cruikshank v. Janson*, 2 Taunt. 301; *Warre v. Miller*, 4 B. & C. 538.

⁴³ See Appendix, Vol. III.

China, or elsewhere, until arrived at the last place of discharge on the outward voyage," it was held that the outward voyage terminated as soon as the outward cargo had been discharged, and that the risk could not be prolonged so as to cover goods taken on board at intermediate places, to be carried onwards to the more distant ports or places named in the policy. (d)

Where in a policy of insurance on a vessel for the outward voyage there is a clause giving her "liberty to touch, stay, &c., at any ports whatsoever to take on board and land goods," the clause will protect the vessel while she is stopping for the *bona fide* discharge of the outward cargo, and is at the same time availing herself of the opportunity of taking in merchandise, being at the time in the due prosecution of the outward voyage; but "the captain has no right to mix up together the two objects of disposing of the remnant of the outward cargo and procuring a homeward cargo at the risk of the underwriters on the outward voyage. When the disposal of the outward cargo ceases to be the sole occasion for his stay at a particular port, these underwriters are discharged." (e) If the party effecting the insurance is ignorant of the particular port at which the goods will be shipped, as well as of the name of the ship and of the species of the goods, he may protect himself against loss by a general insurance of goods of a certain value to be sent to him by sea, whatever may be the ship they are sent in or the place at which they are put on board. (f)

Arrival at the Port of Destination — Mooring in
 [* 703] **Safety.** (g)⁴⁴ — *The extent and limits of the "port of discharge" are regulated by custom and usage; and the term as used in policies of insurance includes the whole port within which any portion of the cargo is usually, according to the custom of such port, taken out of the vessel. Where a ship's place of destination was "her Majesty's dockyard at Deptford," and the vessel got to the dock-gates, but could not get into the dock by reason of ice, which blocked up the entrance,

(d) *Richardson v. Lond. Ass. Co.*, 4 Campb. 94. (f) *Hunter v. Leathley*, 10 B. & C. 358.

(e) *Ld. Ellenborough, Inglis v. Vaux*, 3 Campb. 437; *Moore v. Taylor*, 1 Ad. & E. 25. (g) *Lindsay v. Janson*, 4 H. & N. 704.

and she was accordingly moored in the river alongside the dock-gates, and was there driven on shore and totally lost, it was held that the underwriters continued liable, as she had never been moored in safety at her place of destination within the terms of the policy. (*h*) But where a vessel was chartered for a voyage from Quebec to Wallasey Port, in the River Mersey, or as near thereto as she could safely get, and there discharge her cargo, and the vessel arrived in the Mersey and was towed abreast of Wallasey Port, but could get no farther by reason of her great draught of water, and the captain then began to discharge the cargo in lumpers, and also discharged his crew, and after several days, when a considerable portion of the cargo had been discharged, the ship fell over on her side and was injured, it was held that the vessel had arrived at her place of destination, and that the risk on the policy ceased after she had been moored twenty-four hours in safety, although it appeared that the captain intended ultimately to carry the vessel into Wallasey Port with as much of the cargo as he could carry over the shallow part of the river intervening between his original anchorage and that port. (*i*) If a vessel has sprung a leak or received her "death wound at sea," but comes into port and casts anchor in apparent safety for twenty-four hours, and the mischief is not discovered until after the expiration of the time limited for the continuance of the risk on the policy, the underwriter will nevertheless continue liable, as it is obvious that the vessel never was in reality moored in safety at all. (*k*) But although a ship is damaged, yet if she is not a mere wreck or in a sinking state at the time of her arrival, and is moored as a ship in the possession and control of her owners, she is "moored in safety." (*l*) If an embargo is laid on all English vessels at a foreign port, and the vessel enters in ignorance thereof, and remains at anchor twenty-four hours, and is subsequently

(*h*) *Samuel v. Royal Ex. Ass. Co.*, 8 B. & C. 123; *Stone v. Marine Ins. Co.*, 4 Ex. D. 81. was given for the insured, whereas the court, in *Knight v. Faith*, 19 L. J. Q. B. 517, treat the case as if the verdict had been for the insurer.

(*i*) *Whitwell v. Harrison*, 2 Exch. 127.

(*k*) *Meretony v. Dunlope*, cited 1 T. R. 260, where it is stated that the verdict

(*l*) *Lidgett v. Secretan*, L. R. 5 C. P. 198.

seized, the underwriters are liable; "for she is in the [* 704] * power of the enemy the very moment she enters the port, and is not for one minute moored in safety." (*m*) And if by reason of quarantine regulations or other laws of the port, the vessel is not lawfully moored, but is liable to be sent out of port to perform quarantine or to be examined or fumigated, the risk continues on the policy, although the vessel may have remained at anchor more than twenty-four hours before any actual removal takes place, and before the port regulations against her mooring are enforced. (*n*) But where a vessel, after being moored, remained in actual safety as a ship for twenty-four hours, and so that during those twenty-four hours her owners had complete and undisturbed possession of her, but was afterward seized in consequence of the master having smuggled before her arrival, it was held that the terms of the policy were satisfied, and that the loss by the seizure was a loss after the termination of the risk. (*o*)

Risks in Landing the Goods.⁴⁵ — When the insurance is on goods and merchandise, it is generally expressly provided in the policy that the risk shall continue until the goods have been safely discharged and landed; but whether there is such a provision or not, the risk upon the policy will continue from the time of the loading of the goods on board to the time of their being actually landed at the port of destination. (*p*) Any loss or damage, therefore, sustained in the transshipment of the goods from the vessel to the shore by the upsetting or stranding of boats or lighters will have to be made good by the underwriters, provided the transshipment is made in the ordinary and usual course, and according to the usage of the port and trade, (*q*) and is not made in the boats and lighters of the owner of the goods. If the latter sends his own lighters and servants for the goods, and receives them, the underwriters will be discharged, as the voyage is terminated, and the risk on the policy ceases as soon as the consignee has got the goods into his own possession and under

(*m*) *Minett v. Anderson, Peake*, 277.

(*p*) *Anon., Skinner*, 243.

(*n*) *Waples v. Eames*, 2 Str. 1243:

Horneyer v. Lushington, 15 East, 46.

(*q*) *Stewart v. Bell*, 5 B. & Ald. 238.

(*o*) *Lockyer v. Offley*, 1 T. R. 252.

his own care and management. (r) If the goods are conveyed in public lighters, or in the boats or lighters of third parties, in accordance with the custom and usage of the port, the underwriters will continue liable until the goods are landed, unless such lighters or boats are in the possession and under the control of the consignee or owner of the goods, in which case the voyage will be just as much terminated as if they were his own lighters and boats, the goods being then actually delivered to him and in his possession. (s) On an insurance of goods on a voyage * policy, until the same are safely landed at the [* 705] port of discharge, "including all risks to and from the ship," there is no implied warranty that the lighter used at the end of the voyage to convey the goods from the ship to the shore shall be seaworthy for that purpose. (t) If a vessel is disabled and obliged to put into port before the voyage is completed, and is not worth repairing, and is consequently abandoned, and the master transships the goods, and after such transshipment the goods are lost, the underwriters will be liable upon the policy (u)

Insurance on Profits.¹⁴⁶ — When profits expected to be realized from the carriage of merchandise are insured from the ordinary perils of the sea, and the ship is lost by a peril insured against, but the merchandise is brought safe to the port of destination by another vessel, there is no loss of profit within the meaning of the policy, and the underwriters are not responsible. (x)

Freight Policies.⁴⁷ — The freight to be earned by the vessel on the performance of the voyage may be insured as well as the vessel itself, and the cargo laden on board. "The object of the contract is to protect the insured from being deprived by any of the perils insured against of the profit he would otherwise earn from the carriage of the goods. It is incumbent, therefore, on the

¹ As to loss of profits, see 2 Phillips, Ins. 199, 341; 2 Pars. Mar. Ins. 311; Sansum, Dig. Ins. 1097; Hine & Nichols, New Dig. Ins. 483.

(r) *Sparrow v. Caruthers*, 2 Str. 1236. (u) *Plantamour v. Staples*, 3 Doug. (s) *Hurry v. R. Ex. Ass. Co.*, 2 B. & 1; 1 T. R. 611, n.; *Shipton v. Thorn-P. 430*; *Strong v. Natally*, 1 B. & P. N. ton, 9 Ad. & E. 337. R. 18. (x) *Chope v. Reynolds*, 5 C. B. n. s. (t) *Lane v. Nixon*, L. R. 1 C. P. 412; 651; 28 L. J. C. P. 194. 35 L. J. C. P. 243.

46, 47 See Appendix, Vol. III.

insured to prove that, unless some of the perils insured against had intervened, some freight would have been earned, and evidence must be given, either that goods were put on board from the carriage of which freight would result, or that there was some contract under which the shipowner, if the voyage were not stopped by perils insured against, would have been entitled to demand freight." (y) Prepaid freight cannot be recovered back. (z) When an express contract of affreightment, under which the shipowner is entitled to the freight insured, can be proved, the risk on the policy will commence from the time that the shipowner has put himself into a condition to earn the freight, by making the vessel ready for sea and placing her at the disposal of the charterer, whether any goods have or have not been actually shipped on board under the contract. (a) Thus if a vessel is chartered for a voyage from A to B, the interest in the freight commences on the vessel's sailing for A, either in ballast or with a small quantity only of goods for B, so long as she is starting solely with a view to the charter. [* 706] (b) But if no express contract of affreightment can be proved, the risk will not attach on the policy until goods have been actually shipped on board under circumstances giving the shipowner a right to freight. (c)

When the insurance is on the freight to be earned on the outward and homeward voyage, and there is an express contract of charter-party for the outward and homeward voyage, the liability of the insurer will continue all through the outward and homeward voyage, whether any of the homeward cargo had or had not been taken on board at the time of the loss; (d) but if the insurance is on freight to be earned out and home, and the insured has only made a contract of affreightment for the outward voyage, the liability of the insurer as respects the homeward

(y) *Ld. Ellenborough, Forbes v. Aspinall*, 13 East, 327; *Patrick v. Eames*, 3 Campb. 441.

(z) *Allison v. Bristol Ins. Co.*, 1 Ap. Cas. 209.

(a) *Thompson v. Taylor*, 6 T. R. 478; *Truscott v. Christie*, 2 B. & B. 320; *Devaux v. l'Anson*, 7 Sc. 507; 5 Bing. N. C. 519.

(b) *Barber v. Fleming*, L. R. 5 Q. B. 59, 63; *Foley v. The United Fire Ass. Co.*, L. R. 5 C. P. 155; *Mercantile Steam Co. v. Tyser*, 7 Q. B. D. 73.

(c) *Tonge v. Watta*, 2 Str. 1251.

(d) *Davidson v. Willasey*, 1 M. & S. 313; *Atty v. Lindo*, 1 B. & P. N. R. 236.

voyage will not commence until an express contract of affreightment for the homeward voyage has been entered into, or until a return cargo or return merchandise has been shipped on board, giving the shipowner a right to homeward freight. (e) Freight may be insured for a portion of the voyage as well as a cargo of goods; and if an insurance on freight is effected on a voyage from A to B, the risk is not varied, and the underwriters are not discharged because the vessel is in reality sailing from A to C, touching at B, and the assured has neglected to disclose that fact to the underwriters. (f) But if the voyage is altogether a different voyage from the one insured, as, for instance, if the insurance is on the freight to be earned under a contract of affreightment for a particular voyage, and the voyage is subsequently altered, the underwriter will be discharged. (g) As regards the meaning of the term "freight," it has been held that if the master, in order to make up a full cargo, buys merchandise on behalf of the shipowner, and brings it home, the fair value of the conveyance of such goods may be included under the term freight in the policy. (h) But although "freight" includes the interest of the owner in the carriage of his own goods, yet in an ordinary policy it does not extend to passage money. (i)

Loss of Freight.^{1 48} — To recover for loss of freight, a total loss by perils of the sea must be proved. If the master has the means of repairing a vessel which has sustained sea damage, and of shipping and bringing home the cargo, and neglects to avail himself of the * opportunities within his reach, [* 707] the insurer cannot recover for loss of freight. (k) Where the insurance was on freight, and the ship was injured by perils of the sea, and obliged to put into port and land the cargo to refit, and part of the cargo was so wetted by sea-water that it

¹ 2 Phillips, Ins. 187, 325; 2 Pars. Mar. Ins. 309, 402; U. S. Dig. tit. *Insurance*, sect. 1222; Sansum, Dig. Ins. 570; Hine & Nichols, New Dig. Ins. 234.

(e) *Williamson v. Innes*, 8 Bing. 31, n. *Devaux v. l'Anson*, 7 Sc. 507; 5 Bing. N. C. 519.

(f) *Taylor v. Wilson*, 15 East, 330.

(g) *Sellar v. M'Vicar*, 1 B. & P. N. R. 25.

(h) *Flint v. Flemmyng*, 1 B. & Ad. 45;

(i) *Denocon or Dinecon v. Home & Colonial Assur. Co.*, L. R. 7 C. P. 341; 41 L. J. C. P. 162.

(k) *Philpot v. Swan*, 5 Law T. R. n. s. 183.

could not be re-laden on board without imminent danger of ignition, unless it went through a process which would have detained the vessel six weeks, at an expense equal to the freight, and the master sold the goods, and, finding he could not obtain others, sailed on his voyage, it was held that the underwriters were not liable to make good the loss of the freight on these goods. (*l*) Where the plaintiff, having entered into a charter-party by which the ship was to proceed to Newport and there load a cargo, insured the chartered freight, and the ship on the way to Newport was delayed by the perils insured against for so long a time that the freighter refused, and was justified in refusing, to load a cargo, it was held that there was a total loss of the freight. (*m*)

Insurance on Passage-Money. — When the insurance has been effected on passage-money, and the ship is disabled and obliged to put into port for repairs, and great expenses are incurred in maintaining the passengers, there is no loss for which the underwriters are liable, if the vessel ultimately completes the voyage and earns the money. (*n*)

Deviation from the Voyage insured.¹⁴⁹ — Every policy of insurance is effected upon the implied understanding that the vessel will proceed straightway and without unnecessary delay to her place of destination. If, therefore, she voluntarily deviates from her course to put into port, and is afterward lost, the underwriters will be discharged, (*o*) unless it be shown that she went there under the pressure of necessity, (*p*) or for necessary repairs or purposes essential to the safe prosecution of the voyage, (*q*) or to avoid pirates, or icebergs, or other dangers of navigation, (*r*) or that she went out of her way for the purpose of

¹ As to deviation and consequent change of risk, see 2 Pars. Mar. Ins. c. 1; 1 Phillips, Ins. c. 12; U. S. Dig. tit. *Insurance*, sect. 1116; Hine & Nichols, New Dig. Ins. 184; Sansum, Dig. Ins. 404.

(*l*) *Mordy v. Jones*, 4 B. & C. 400. Act, 1852, see *Gibson v. Bradford*, 4 Ell. & Bl. 586; 24 L. J. Q. B. 159.
 (*m*) *Jackson v. Union Insurance Co.*, L. R. 8 C. P. 572; 10 C. P. 125; see (*o*) *Elliot v. Wilson*, 4 Bro. P. C. 470.
Inman Steam Co. v. Bischoff, 6 Q. B. D. 648. (*p*) *Scott v. Thompson*, 1 B. & P. N. R. 181.
 (*n*) *Willis v. Cooke*, 5 Ell. & Bl. 647; (*q*) *Weir v. Aberdeen*, 2 B. & Ald. 25 L. J. Q. B. 16. As to insurances against the charges and liabilities which may be incurred under the Passengers 179.

succoring a ship in distress, (*s*) or of procuring convoy, (*t*) or had liberty by the charter-party to make deviations or to call at different ports for trading purposes. A deviation for the purpose of saving life is justifiable, but not a deviation for the mere purpose of saving property. (*u*) * It is not [* 708] necessary to a deviation or change of risk whereby the underwriters are discharged, that the degree or period of the risk should be thereby increased. (*x*) If the voyage insured has been actually abandoned, and it has been determined to alter the ship's destination, the underwriters will be discharged; but a mere meditated change of destination, not carried into effect by an actual abandonment of the voyage, will not have that effect. (*y*) If a ship insured for one voyage sails upon another, and the same track for part of the distance leads towards both places of destination, and the vessel is taken before she arrives at the dividing point for the two voyages, the underwriters are nevertheless discharged, because there never was any inception at all of the particular voyage insured. (*z*) But if there is an actual inception of the voyage insured, and there exists only an intention to deviate, and no deviation had in fact taken place at the time of the loss, the underwriters will remain liable. (*a*) And if a loss occurs before any actual deviation has taken place, and the vessel afterward deviates, the loss will fall upon the underwriters. (*b*) But a vessel, or goods, or freight may be insured for part of a voyage as well as the whole distance; and if a vessel is chartered from A to C touching at B, and the vessel is insured from A to B, there is no pretence for saying that the underwriters are discharged merely because the vessel is going on to an ulterior place of destination which is not disclosed at the time they accept the risk. (*c*) And if a ship is compelled

(*s*) *Arnold, Ins.* 405; *The Jane*, 2 Hag. Adm. 345.

(*t*) *Bond v. Nutt*, 2 Cowp. 601.

(*u*) *Scaramanga v. Stamp*, 5 C. P. D. 295, C. A.

(*x*) *Phillips on Insurance*, 983; *Hartley v. Buggin*, 3 Dougl. 39; *Company of American Merchants v. British & Foreign Insurance Co.*, L. R. 18 Ex. 154.

(*y*) *Tasker v. Cunninghame*, 1 Bligh, 87; *Driscoll v. Bovil*, 1 B. & P. 313.

(*z*) *Way v. Modigliani*, 2 T. R. 32.

(*a*) *Foster v. Wilmer*, 2 Str. 1249; *Heselton v. Allnutt*, 1 M. & S. 46.

(*b*) *Green v. Young*, 2 Ld. Raym. 840; 2 Salk. 444; *Hare v. Travis*, 7 B. & C. 16.

(*c*) *Taylor v. Wilson*, 15 East, 330.

by adverse circumstances in the course of her voyage to enter a port to victual, or repair, or refit, or if she is compelled to cast anchor, to pay toll, or to await a fair wind, she may avail herself of the opportunity to take in some additional cargo, provided no additional delay is thereby created. (*d*) But if the circumstances rendering it necessary to go into port or to cast anchor have been designedly brought about by the insured, this is a fraud upon the underwriters which discharges them from liability.

If a ship with goods on board insured on a voyage to a foreign port, learns in the course of the voyage thither that an embargo has been laid on all ships of her nation at that port, but there is a prospect of the speedy removal of the embargo, and she accordingly goes into port as near as she can safely get to the port of destination, and there waits a short time for the [* 709] removal of the * embargo, with the intention of continuing the voyage, she will be protected by the policy in so doing. But if she abandons the voyage and sails back to her port of outfit and is lost on the homeward voyage, (*e*) or if, through reasonable fear of an embargo, or of the ports of destination becoming hostile ports, she sails to a port not named in the policy, and so embarks on a new voyage or adventure, the underwriters will be discharged, as the new risk then run is not the risk they insured against. (*f*) If the vessel goes out of her course in order to avoid a peril not insured against, and is lost, the underwriter will be discharged, but not if the peril sought to be avoided was covered by the policy. Thus where loss from capture in a particular port was excepted from the policy, and the vessel ran out to sea and out of her course to avoid capture, and sailed to an adjoining port, and was lost from peril of the sea, it was held that the underwriters were not liable; (*g*) but where the vessel was insured against capture in port, and put to sea, and deviated from her course to avoid capture, it was held that they were liable. (*h*)

(*d*) *Laroche v. Oswin*, 12 East, 131.

(*g*) *O'Reilly v. R. Ex. Ass. Co.*, 4

(*e*) *Blackenhagen v. Lond. Ass.*, 1 Campb. 246.

(*h*) *O'Reilly v. Gonne*, 4 Campb. 249.

(*f*) *Oliverson v. Brightman*, 8 Q. B. 781.

Unreasonable Delay⁵⁰ at any place at which the vessel is authorized to touch is equivalent to a deviation; for it is an implied term of every contract of insurance that the voyage shall be performed without delay, unless liberty is given to the vessel to halt in her course; and, consequently, if there are necessary stoppages, the adventure becomes a different adventure from that which the underwriters agreed to insure. (i) But if the delay is necessary and reasonable, the risk on the policy will continue, and the underwriters remain chargeable. (k)

Insurances on Voyages to Several Ports and Places.⁵¹ — When the insurance is on a voyage to several ports and places named in successive order, and the final port of discharge is fixed, the general rule is that the vessel must go to them in the order in which they are named in the policy, unless a different intention is manifested by the policy, or unless a usage to the contrary be established; but if they are not named in successive order, they must be taken in the order in which they occur in the usual and most convenient and practicable course of the voyage, without reference to the shortest geographical distance; and if the ship's final port of discharge is not fixed, but the vessel is at liberty to select any port that may be found most suitable as a discharging port, she may take any port she is authorized to touch at in any order she may think fit. (l)

* Where a ship and freight were insured "at and [* 710] from Pernambuco or any other ports in the Brazils to London, beginning the adventure upon the said ship," &c., on the termination of her cruise and preparing for her voyage to London, and the cruise terminated and the vessel put into Pernambuco to obtain a cargo, but finding none, sailed to San Salvador, a Brazilian port, five hundred miles distant, and was lost on the way, it was held that the sailing from Pernambuco to San Salvador was not a deviation, and that the policy was intended to secure the vessel from loss whilst she was procuring her cargo in some one or other of the Brazilian ports. (m) So where a policy was at and from Martinique and all or any of

(i) *Mount v. Larkins*, 8 Bing. 122.

(m) *Lambert v. Liddard*, 5 Taunt.

(k) *Phillipps v. Irving*, 8 Sc. N. R. 8. 480.

(l) *Andrews v. Mellish*, 5 Taunt. 502.

50, 51 See Appendix, Vol. III.

the West India Islands to London, and the vessel sailed from Martinique to St. Domingo to take in her cargo, which was far away from the direct course from Martinique to London, it was held that there was no deviation. (*n*)

Licenses to touch at Different Ports and Places.⁵² — When by the express terms of the policy the vessel is to be “at liberty, in the outward or homeward bound voyage, to proceed, sail to, touch, and stay at any ports or places whatsoever, without the same being deemed a deviation,” the liberty extends only to such places as are in the usual course of the voyage, and customarily resorted to by traders making such voyages. (*o*) A license of this kind will not enable the captain to alter the regular course of the voyage, or touch at any place or port for purposes unconnected with the main adventure, (*p*) or to stay an unreasonable time at places he is authorized to touch at; (*q*) and if he sails with convoy, it will not authorize him voluntarily to stay at places when by so doing he will part company with the convoy. (*r*) Whenever a vessel is on a seeking voyage, and is to look about for some safe port of discharge, and has consequently “liberty to touch at any port or ports” in a particular sea “for orders or any other purpose,” the insured will be entitled to make every call, stay, or delay which may be necessary for safety and for the due accomplishment of the object of the voyage. (*s*) Where the name of the place to which the vessel is to sail comprehends a particular town and harbor, and also an extensive district of coast, the policy will cover and protect only a voyage from the particular town and harbor, unless it appears [* 711] that by maritime custom and usage the whole * line of coast is considered, for insurance purposes, to be included under the name used in the policy. (*t*) An open roadstead is a port within the meaning of the term “port” in a policy, if it is used as such by seafaring persons, and is resorted

(*n*) *Bragg v. Anderson*, 4 Taunt. 229; *Ashley v. Pratt*, 16 M. & W. 471; 450.

Pratt v. Ashley, 1 Exch. 257; 17 L. J. Ex. 135.

(*o*) *Lavabre v. Wilson*, 1 Doug. 284.

(*p*) *Bottomley v. Bovill*, 5 B. & C. 218.

(*q*) *Urquhart v. Barnard*, 1 Taunt. 450.

(*r*) *Williams v. Shee*, 3 Campb. 469.

(*s*) *Hunter v. Leathley*, 10 B. & C.

873; 7 Bing. 517.

(*t*) *Constable v. Noble*, 2 Taunt. 403.

to by shipping for the discharge and loading of cargoes and merchandise. (*u*)

Sometimes vessels are expressly insured for a general voyage to any ports or places whatsoever, in port and at sea, in all places, at all times, and in all services, to the intent that the risk may be covered by the policy, whatever may be the employment of the vessel, and however long the duration of the voyage.

Total Loss and Abandonment¹—**Notice of Abandonment.**⁵³—

If a ship insured for a particular voyage grounds on a sandbank and cannot be got off, the loss is a total loss, although the ship still exists *in specie*. If she is disabled by stress of weather, and is so strained and shaken as not to be worth repairing, the loss is a total loss, although she still exists as a ship in the dock-yard. And when a vessel has been wrecked, the cargo is totally lost if no part of it can be recovered for the benefit of the assured. If a cargo is so much injured as to be unfit for conveyance to the port of destination, and has consequently been landed at an intermediate port to prevent its entire destruction, the loss is in contemplation of law, as between the underwriter and insured, a total loss, and the latter is entitled to recover the full amount of the insurance. (*x*) But in these cases, when the subject-matter of the insurance is not totally destroyed, the insured must, in order to recover the full amount of the insurance as for a total loss, ABANDON what remains, *i. e.* he must make a cession of all his proprietary rights thereto to the underwriters, and give them notice of abandonment. The notice of abandonment is required in all cases to give the insurers the means of inquiry and of guarding against fraud, to enable them to repair the ship if they should deem such a proceeding for their advantage, and to secure all the benefit that can be derived from the wreck. It must be given "within a reasonable time after the insured

¹ 2 Pars. Mar. Ins. c. 3, 4; 2 Phillips, Ins. c. 17; U. S. Dig. tit. *Insurance*, sects. 1197-1465; Sansum, Dig. Ins. 1, 1396; Hine & Nichols, New Dig. Ins. 1, 298; Taber v. China Mut. Ins. Co., 131 Mass. 239.

(*u*) Sea Ins. Co. v. Gavin, 4 Bligh, 460; Harrower v. Hutchinson, L. R. 5 N. S. 578; Brown v. Tayleur, 4 Ad. & Q. B. 584.
E. 248; Cockey v. Atkinson, 2 B. & A.

(*x*) Ionides v. The Universal Ins. Co., 14 C. B. N. S. 292; 32 L. J. C. P. 176.

⁵³ See Appendix, Vol. III.

receives intelligence of the accident, that the underwriter may be entitled to the benefit of what may still be of value." (y) Where the insured receives information that the subject of insurance is in *imminent* danger of becoming a total loss, he must immediately give notice of abandonment, and it is im- [* 712] material that *the subject of insurance is afterward justifiably sold. (z) The abandonment must be an unconditional and unreserved abandonment of the whole of the subject-matter of the insurance to the insurers or underwriters, unless the latter think proper to accept of a conditional abandonment. When the subject-matter of the insurance totally perishes, no notice of abandonment is necessary; for there is nothing to abandon. (a) And when it is so far annihilated that it no longer exists *in specie*, a formal abandonment of the comparatively valueless remnants of what was once a ship or a cargo is not necessary to enable the assured to recover as for a total loss, (b) although if these remnants are worth anything at all, or have been sold, the underwriters will be entitled to them, or to the value of them, or to the price they have fetched; for it is contrary to the principle of every contract of indemnity to permit the insured to recover more than the amount of the loss sustained. (c) If the insurance is on freight, and the voyage is lost by a peril insured against, so that the freight cannot be earned by the insured, the loss is a total loss, and there is no need of an abandonment of freight; "for there is nothing to abandon." (d) If the adventure is brought to an end by a peril insured against, and the things are taken out of the power of the insured, as, for instance, if they are totally lost to him by reason of capture or seizure in a foreign port, or by political laws working detention and sale by a court, or by circumstances of distress and danger creating a mercantile necessity for a sale,

(y) *Mitchell v. Edie*, 1 T. R. 613; *Knight v. Faith*, 15 Q. B. 659; *Gernon v. Royal Exchange, &c.*, 6 Taunt. 383; *King v. Walker*, 33 L. J. Ex. 325; 3 H. & C. 209; *Stringer v. The English Ins. Co.*, L. R. 4 Q. B. 676; *aff'd* 5 Q. B. 599.

(z) *Kaltenback v. Mackenzie*, 3 C. P. D. 467, C. A.

(a) *Rankin v. Potter*, L. R. 6 H. L. Cas. 83; 42 L. J. C. P. 169.

(b) *Cambridge v. Anderton*, 2 B. & C. 691; *Allen v. Sugrue*, 8 B. & C. 561.

(c) *Roux v. Salvador*, 4 Sc. 34.

(d) *Idle v. Roy. Ex. Ass. Co.*, 8 Taunt. 755; 3 Moore, 142; *Mount v. Harrison*, 4 Bing. 388; 1 M. & P. 14; *Rankin v. Potter*, *supra*.

there is no necessity for any notice of abandonment. (e) And where the sale was not under a condemnation of any court, but took place because the insured declined to give security to prevent the sale, it was held that such sale was a total loss occasioned by the seizure, the giving of the security under the circumstances not being the course which a prudent uninsured owner would have adopted. (f) But it is otherwise where the sale is not a necessary or natural consequence of any of the perils insured against. (g) A constructive total loss is a total loss within the meaning of a policy against "total loss only." (h)

By whom Notice of Abandonment may be given.⁵⁴—

The party *giving notice of abandonment must be the [* 713] party in whom the property in the ship is at the time vested. Where, therefore, a policy of insurance has been deposited as security for an advance of money, the pledgee of the policy has no implied authority to give notice of abandonment; but it is otherwise with a person who has a mortgage on the ship. (i)

Form of Notice of Abandonment.—The word "abandon" need not be used; any words showing an intention to give up the property insured upon the ground of its having been totally lost will be sufficient. (k)

Effect of Notice of Abandonment.⁵⁵—The effect of a notice of abandonment, therefore, is to put the insured into a condition to claim from the underwriters as for a total loss, provided the facts as they are subsequently established warrant an abandonment. If they do not warrant an abandonment, or the insured neglects to give prompt notice of abandonment, he must proceed against the underwriters for the loss he has actually sustained. The insured then makes the best of what he can save, and resorts to the underwriter for the actual loss, after deducting the value of the remnants. On the other hand, when there is a

(e) *Farnworth v. Hyde*, 34 L. J. C. P. 207; 18 C. B. N. s. 835; *Mullett v. Shedden*, 13 East, 304; *Mellish v. Andrews*, 15 ib. 16.

(f) *Stringer v. The English, &c. Insurance Co.*, L. R. 4 Q. B. 676, 690; 5 Q. B. 599.

(g) *De Mattos v. Saunders*, L. R. 7 C. P. 570.

(h) *Adams v. Mackenzie*, 13 C. B. N. s. 442; 32 L. J. C. P. 92.

(i) *Jardine v. Leathley*, 3 B. & S. 700; 32 L. J. Q. B. 132.

(k) *Currie v. The Bombay Native Ins. Co.*, L. R. 3 P. C. 72.

^{54, 55} See Appendix, Vol. III.

constructive total loss and an abandonment, the risk of saving what remains to be saved is thrown upon the underwriter. After the abandonment, the insurer stands in the place of the insured, and is clothed with the ownership of the property saved, and is entitled to all the profits and advantages that may accrue therefrom; and if the assured recovers and retains possession of any portion of the property, the underwriters may maintain an action against him for the recovery of the value of it. (*l*) The abandonment is retrospective in its operation, so that the title of the abandonees relates back to the time of the loss. (*m*)

Insurance on Freight.⁵⁶—Where a ship and the freight to be earned on the voyage were insured by separate sets of underwriters, and the ship was captured, and the ship and freight were abandoned to the respective underwriters, who each paid as for a total loss, and after that the ship was recaptured, and then performed her voyage and earned freight, it was held that the underwriters on the *ship* were entitled to the freight so earned, to the exclusion of the underwriters on the freight; “for freight follows as an incident the property in the ship.” (*n*) The insured ship is by the abandonment vested in the underwriters from the time of the loss; and as their ship earns the [* 714] freight, they are entitled to it *as purchasers of the ship; (*o*) but if at the time of the casualty there is no freight pending, as, for instance, if the shipowner is carrying his own goods, the abandonment can give no right to freight. (*p*) Where after an embargo on a ship, the ship and freight were abandoned to the respective underwriters, and the embargo was taken off, and the ship completed her voyage and earned freight, it was held that the shipowners had no right to the freight earned after the abandonment of the ship, and that the loss of freight was not demandable from the underwriters on freight, as it was not lost by means of the perils insured against, but by reason of the abandonment of the ship, which was the act of the insured themselves. (*q*) A total loss of the ship, therefore, does

(*l*) *Leatham v. Terry*, 3 B. & P. 479.

(*o*) *Hickie v. Rodocanachi*, 4 H. & N.

(*m*) *Cammell v. Sewell*, 3 H. & N. 466; 28 L. J. Ex. 273.

644; 27 L. J. Ex. 447.

(*p*) *Miller v. Woodfall*, 8 Ell. & Bl.

(*n*) *Davidson v. Case*, 5 Moo. 116.

504; 27 L. J. Q. B. 120.

(*q*) *M'Carthy v. Abel*, 5 East, 388.

not necessarily involve a total loss of the freight. The ship may get to port a mere wreck, and deliver her cargo and earn freight, and the shipowner may elect to abandon and proceed for a total loss; but if he does so, the underwriters of the ship will be entitled to the freight, and the insured will have no claim to any indemnity from the underwriters on freight for the loss of freight. Thus where a ship and freight were separately insured by separate policies, and the ship came into port greatly damaged, and after survey was found not worth repairing, and was finally abandoned, but the cargo was safely landed, and the freight was earned and received by the shipowners, and was then handed over by them to the underwriters, as incident to the ship, which being done, the shipowners proceeded against the underwriters on freight for indemnity for loss of freight, it was held that they had no claim whatever in respect thereof, as the freight had been earned and actually received by the shipowners, and might have been retained by them for their own use, but for their subsequent voluntary election to abandon to the underwriters on the ship, and to constitute such underwriters the owners of the damaged ship and the freight earned by it. (r)

But in all these cases where the underwriters are entitled to the freight after abandonment, the freight has been earned by the insured ship. If another ship finishes the voyage, the underwriters are not entitled to the freight, unless the substituted vessel is their vessel, or has been hired for their benefit by their agents. (s) And if the goods in the ship are the property of the owner of the ship, and he is carrying them on his own account, the abandonees of the ship have no claim to freight. (t)

* The shipowner and charterer may agree that a portion of the freight shall be prepaid, in which case, as it cannot be recovered back, that portion is not a risk, and is not insurable; but the remaining portion may be insured, and if the ship is wrecked, and only such an amount of cargo is saved

(r) *Scot. Marine Insur. Co. v. Turner*, 17 Jur. 631; 4 H. L. C. 312, n.; 467; 28 L. J. Ex. 273.
Benson v. Chapman, 8 C. B. 964.

(s) *Hickie v. Rodocanachi*, 4 H. & N.

(t) *Miller v. Woodfall*, 8 Ell. & Bl. 493; 27 L. J. Q. B. 120.

as corresponds with the prepaid freight, the insured may recover as for a total loss. (u)

When the Insured may Abandon — Total Losses.⁵⁷ — The general rule is that the insured may abandon in every case, and claim for a total loss when, by the occurrence of any of the misfortunes or perils insured against, the subject-matter of the insurance is so injured or deteriorated as to render any farther dealing with it in the mode contemplated at the time the policy was effected worthless. If a vessel insured for a voyage is so much injured by perils of the sea that the cost of the repairs will be more than the vessel is worth when repaired, the insured may abandon, and claim for a total loss; (y) but not if the vessel is worth repairing, and can be repaired and refitted for sea at an expense less than her value when repaired. (z) So if a stranded vessel can by any means within reach of the captain, which he could reasonably use, be recovered and saved, the vessel cannot be abandoned by the insured; and if the captain, to avoid the trouble of recovering the vessel, sells her as she lies, the sale will not entitle the insured to treat the loss as a total loss, and to abandon to the underwriters. (a) When a ship and cargo are so submerged that both must be got up together, the expenditure incurred in raising them is for the common preservation of both, and the cargo must contribute thereto as well as the ship, and the amount to be contributed by the cargo must be taken into account for the purpose of ascertaining whether or not the ship is a total loss. (b) The loss of the voyage has nothing to do with the loss of the ship; and the shipowner who has

(u) *Allison v. Bristol Marine Ins. Co.*, 1 Ap. Cas. 209.

(y) *Young v. Turing*, 2 Sc. N. R. 762; *Irving v. Manning*, 2 C. B. 784; 1 H. L. C. 287; *Phillips v. Nairne*, 4 C. B. 358; *De Cuadra v. Swann*, 16 C. B. n. s. 772. In America, if the subject-matter of insurance sustains damage to an extent beyond 50 per cent, the assured may abandon and recover as for a total loss, unless there is something expressed in the policy to exclude this implication; and this right depends on the state of things when the notice of

abandonment was given, and is not altered by any subsequent change in the state of things. *Per Blackburn, J.*, *Kemp v. Halliday*, 7 B. & S. 723; 34 L. J. Q. B. 233.

(z) *Moss v. Smith*, 9 C. B. 103; 19 L. J. C. P. 225.

(a) *Knight v. Faith*, 15 Q. B. 657; 19 L. J. Q. B. 509; *Gardener v. Salvador*, 1 M. & Rob. 116; *Doyle v. Dallas*, ib. 48; *Tanner v. Bennett*, R. & M. 182.

(b) *Kemp v. Halliday*, 34 L. J. Q. B. 233; 35 L. J. Q. B. 156; 6 B. & S. 723; L. R. 1 Q. B. 520.

insured his ship cannot abandon the ship merely because the voyage cannot be completed and the freight earned. (c) If the policy is on freight, and the ship is detained by an embargo, the loss is *prima facie* total; but if the embargo be taken off, and * she then earns freight, the loss is partial [* 716] only. (d) If the vessel is driven by stress of weather into port to repair and refit, and the master hypothecates the ship, freight, and cargo for the payment of these repairs, and the amount exceeds the value of the ship and freight, the loss is a total loss. (e) Where goods are, in consequence of the perils insured against, lying at a place different from their destination, damaged, but in such a state that they can at some cost be put in a condition to be carried to their destination, the question to be determined is whether it is practically possible to carry them on, that is, whether to do so will cost more than they are worth; and in determining this there must be taken into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing, and re-shipping the goods; but there must not be taken into account the fact that if they are carried on in the original bottom, or by the original shipowner in a substituted bottom, they will have to pay the freight originally contracted to be paid, that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not. (f) Where the original bottom is disabled by the perils of the sea, so that the shipowner is not bound to carry the goods on, and he does not choose to do so, there must not be taken into account the whole of the cost of transit from the place of distress to the place of destination, which must be incurred by the goods owner if he carries them on, but only the excess of that cost above that which would have been incurred if no peril had intervened. (g)

The mere suspension or retardation of the voyage in the case of an insurance on goods and merchandise is no ground of aban-

(c) *Pole v. Fitzgerald*, Willes, 647.

(d) *Everth v. Smith*, 2 M. & S. 278.

(e) *Benson v. Chapman*, 7 Sc. N. R. 625; 2 H. L. C. 720.

(f) *Farnworth v. Hyde*, L. R. 2 C.

P. 204.

(g) *Rosetti v. Gurney*, 11 C. B. 176; 20 L. J. C. P. 257; *Farnworth v. Hyde*, *supra*.

donment. (*h*) If, however, the voyage is not worth pursuing by reason of the delay, or if salvage services have been rendered, and the insured has no means of paying them, he may persist in the abandonment, and claim as for a total loss; but if it appears that he could probably have raised money to liberate the vessel, and that he made no exertion to do it, he cannot treat the loss as a total loss; for he is bound in every case to exert himself to the uttermost of his power to prevent the loss from being a total loss. (*i*) If the ship, being disabled at sea, is deserted by her crew, and is subsequently detained for salvage, and the cargo, being of a perishable nature, is so much damaged as not to be worth sending to the place of destination after [* 717] satisfaction of the claim of the * salvors, the loss is a total loss. (*k*) If the cargo is taken out of the possession and control of the insured by the barratrous conduct of the master or crew, and some portion of it is afterward recovered, the insured may nevertheless abandon and treat the loss as a total loss. (*l*) If the cargo can be transhipped and forwarded to the port of destination without any material deterioration or delay, the insured has no right to abandon it and claim for a total loss; but it is his duty to go on with the adventure and turn it to the best advantage, and to proceed against the underwriter for a partial loss, being the amount of the actual damage sustained by the peril insured against. (*m*)

Capture and Re-Capture and Abandonment — Embargo — *Spes Recuperandi*.⁵⁸—Capture by an enemy or a pirate, or an arrest of princes, or an embargo, entitles the insured to abandon and claim for a total loss, unless the embargo has been taken off, or the vessel has been recaptured and restored to the owners, or they have the immediate means of recovering the vessel, (*n*) and may reasonably be expected to take possession of it. (*o*) On

(*h*) *Anderson v. Wallis*, 2 M. & S. 240. (*n*) *Goss v. Withers*, 2 Barr. 692; *Kleinwort v. Shepard*, 28 L. J. Q. B. 147; *Cologan v. Lond. Ass. Co.*, 5 M. & S. 455; *Wilson v. Forster*, 6 Taunt. 25.

(*i*) *Thornely v. Hebson*, 2 B. & Ald. 518. (*o*) *Lozano v. Janson*, 28 L. J. Q. B. 343; 2 El. & El. 160.

(*k*) *Parry v. Aberdein*, 9 B. & C. 416.

(*l*) *Dixon v. Reid*, 5 B. & Ald. 597.

(*m*) *Hunt v. R. Ex. Ass. Co.*, 5 M. & S. 53; *Falkner v. Ritchie*, 2 ib. 293.

recapture by an English vessel, the shipowner has a right to the restitution of his ship on payment of salvage; and if the insurance is on the ship, and the ship is recaptured and placed within the power of the insured, the loss, which was before a total loss, becomes then only a partial loss, (*p*) unless the vessel is in a damaged and unseaworthy state, or the salvage and costs and expenses attendant upon the recapture are likely to be more than the vessel is worth, and the voyage cannot be advantageously prosecuted. If the vessel be captured and recaptured, and the insured neither has the vessel restored to him nor any means of obtaining possession of it, or if the consequences of the capture are such as to occasion a total obstruction of the voyage, "or render it not worth pursuing, if the salvage be high, if farther expense be necessary, and the insurer will not, at all events, undertake to pay that expense, the loss continues a total loss, and the insured may abandon, notwithstanding the recapture." (*q*) Where a ship was captured and recaptured, and sold in a distant country to pay the salvage, and the residue of the proceeds remained in the court of admiralty there, it was held that the insured might abandon and recover for a total

*loss. (*r*) If the insurance is on goods and merchandise laden on board the vessel, and the vessel is captured, and notice of abandonment is given by the assured, and after that the vessel is recaptured, with the goods and merchandise on board uninjured, the insured cannot persist in his abandonment and claim for a total loss. (*s*) And if the vessel is unable to complete her voyage by reason of an embargo suddenly laid on English vessels at the port of destination, or by reason of the hostile interference of an enemy, the insured cannot on that account abandon the goods and claim for a total loss, unless the goods have been deteriorated and injured and rendered unfit for mercantile speculation and adventure. (*t*)

(*p*) *Hamilton v. Mendez*, 2 Burr. Fletcher, 1 Doug. 232; *M'Iver v. Henderson*, 4 M. & S. 584.

Barber, 5 M. & S. 418; *Bainbridge v. Neilson*, 10 East, 329.

(*q*) *Dean v. Hornby*, 3 Ell. & Bl. 190; 23 L. J. Q. B. 129; *Miles v.*

(*r*) *Pringle v. Hartley*, 3 Atk. 195.

(*s*) *Naylor v. Taylor*, 9 B. & C. 718.

(*t*) *Hadkinson v. Robinson*, 3 B. & P. 388; but see *Barker v. Blakes*, 9 East, 293.

Unreasonable Abandonment⁵⁹ — "The privilege of abandoning," it has been justly observed, "is liable to great abuse. Where, as in the case of capture, the thing insured is completely gone out of the power of the insured, it is just and proper that he should recover at once as for a total loss, and leave the *spes recuperandi* to the insurer. But it seems unreasonable that the owner of a ship which is stranded (the captain and crew, his servants, being on the spot and in possession of the ship and cargo) should be at liberty to abandon these to a number of underwriters who sometimes find it difficult to act in concert, and who have, perhaps, no means of disposing of the property thus thrown upon their hands but to the greatest disadvantage." (u) "I am not disposed," observes Lord Ellenborough, "to enlarge the grounds of abandonment against underwriters, — a privilege which every one knows has been much abused. In almost every case of a valued policy, it is the interest of the insured to abandon; and it therefore becomes the court to watch every such case, and in no instance to enlarge that which in its nature is only an average into a total loss." (x)

Partial Loss¹ — **Exception of Partial Losses**⁶⁰ — A partial loss is not paid for if there is a total loss of the vessel from perils insured against during the period covered by the policy; because when the underwriter pays the total loss, he actually discharges all partial losses occurring during the voyage except such as fall within the suing and laboring clause, which are apart from the sum insured. He never stipulated to pay more than the total loss; and if he were to pay for a partial loss, and also the whole value of the vessel, he would be paying more than he undertook to indemnify the insured against. If a partial loss is sustained, and then the whole subject-matter of the insurance is totally lost from a peril excepted from the policy, the under-
[* 719] writers will not be responsible for the *partial loss, unless it has occasioned actual pecuniary loss to the

¹ As to partial loss and particular average, see 2 Pars. Mar. Ins. c. 7; 2 Phillips, Ins. c. 16; U. S. Dig. tit. *Insurance*, sects. 1247-1265, 1486; Sansum, Dig. Ins. 889; Hine & Nichols, New Dig. Ins. 389, 705.

(u) Marshall on Insurance, p. 565, (x) Bainbridge v. Neilson, 10 East, 343.

insured. (y) But if the total loss does not take place until after the expiration of the period covered by the policy, the underwriter will be responsible for the partial loss, and must pay the amount of the diminution in the value of the vessel occasioned by the partial loss, without reference to whether the vessel had been repaired or not before the total loss occurred. (z) If a vessel loses a mast by a peril insured against, and is refitted, the loss is a partial loss; and if the vessel then puts to sea and is totally lost, the insured is entitled to be indemnified in respect of the partial loss as well as the total loss; but if before the vessel is refitted she is totally lost, the insured cannot then recover in respect of the partial loss. (a) In case of a partial loss, and in the absence of other means of arriving at the loss, the insured is entitled to recover the cost of repairs up to the amount insured, with the reduction of one third new for old, even although this amount might be more than the amount payable for a total loss with benefit of salvage. (b) A memorandum is frequently introduced at the foot of maritime policies, exempting the underwriters from all partial losses upon certain articles and descriptions of merchandise, and from all partial losses not amounting to £5 per cent upon other classes of merchandise, and from all partial losses upon ship and freight not amounting to £3 per cent, unless the loss be a general average and contribution loss (*ante*, pp. * 514, * 518). In many policies the underwriters exempt themselves from all partial or average losses of every description, excepting general average losses, so that they are not responsible at all upon the policy unless there is a total loss, or unless there has been a general average contribution. When the policy is warranted "free from particular average," no damage short of the absolute destruction of the thing insured will amount to a total loss. An exemption of this kind opens a wide door to fraud, inasmuch as a direct premium is offered to the insured to turn every partial loss into a total loss, in order that it may be covered by the policy. (c)

(y) *Livie v. Janson*, 12 East, 656.

755, where repairs were actually done;

(z) *Lidgett v. Secretan*, L. R. 6 C. P. 616.*aliter* where not done: see *Pitman v. Universal Ins. Co.*, 9 Q. B. D. 192, C.(a) *Stewart v. Steele*, 5 Sc. N. R. 941.

A., diss. Brett, L. J.

(b) *Aitchison v. Lohre*, 4 Ap. Cas.(c) *Dyson v. Rowcroft*, 3 B. & P. 476.

General and Particular Average¹—Policies warranted free from Average.⁶¹—The term “average” is used, in insurance contracts and trading adventures, to denote every kind of partial loss or damage happening either to the ship or the cargo, from any cause whatever. It has been truly observed that ambiguities frequently arise from the indiscriminate use, in mercantile matters, of the word AVERAGE, which has no less [* 720] than four different meanings * amongst commercial men.

In policies of insurance we constantly meet with the terms “general average” and “particular average:” the first signifies general average losses arising from the general contribution made by all parties interested in a ship or cargo towards a loss sustained by some for the benefit of all, under the circumstances previously described (*ante*, pp. * 514, * 515); and the second, the particular or partial loss sustained by the insured, not connected with the loss of any other party, and not occasioned by a general average contribution. For example, if a small portion of corn or flax receives damage from sea-water to the extent of £45, and the entire value of the whole cargo is £1000, this is an average loss of $4\frac{1}{2}$ per cent upon the whole, and is called “average” in mercantile phraseology; so that if the cargo is warranted “free from average under £5 per cent,” the underwriters will be exempted from all responsibility in respect of this partial or average loss. (*d*) If a cargo of corn insured “free from average” receives damage from sea-water, and the vessel puts into port for the purpose of drying the corn and preventing its total destruction, and the corn is so much damaged that if brought home it could not have been sold for an amount exceeding the expenses of unshipping, drying it, and bringing it home, the loss is total; but if the value of the corn in England would exceed these expenses, the loss is an average loss within the warranty exempting the underwriters from lia-

¹ As to general average, see 2 Pars. Mar. Ins. c. 5; 2 Phillips, Ins. c. 15; U. S. Dig. tit. *Insurance*, sect. 1466; Sansum, Dig. Ins. 605; Hine & Nichols, New Dig. Ins. 239, 699.

(*d*) *Wilson v. Smith*, 3 Burr. 1550; *penheim v. Fry*, 33 L. J. Q. B. 267; 5 M'Andrews v. Vaughan, 1 Park. Ins. B. & S. 348. 252; *Mason v. Skurry*, ib. 253; Op-

bility. An insurance on goods warranted free of average, unless general, is equivalent to an insurance against their total loss only. As a general rule, where the whole or any part of the cargo is capable of being sent in a marketable state to the port of destination without laying out more money than it is worth, the master cannot sell, nor can the insured recover for a total loss. (e) But the effect of a warranty against particular average is merely to limit the operation of the insurance to a total loss of the subject-matter, and is not to prevent a recovery under the suing and laboring clause of extraordinary expense which may be incurred in preserving it. (f)

Insurance on Separate Bales or Packages — Average and Total Losses.⁶²—If the merchandise insured is packed in separate bales, hogsheads, or packages, and the insurance is effected on each bale, hogshead, &c., separately, and some bales or hogsheads are totally lost and others saved, the loss of each separate bale, hogshead, &c., * is a total loss *pro tanto*; (g) [* 721] “but when the insurance is upon the bulk, and the goods are all of the same species, unless the loss exceeds the value specified in the memorandum, there is no average or partial loss, and there cannot, in such a case, be a total loss of a portion of the cargo.” (h) Where an insurance had been effected on goods generally, and several thousand bags of linseed were put on board, and by the memorandum as to average, seed was warranted free from average, the Court of Exchequer Chamber thought it was necessary, in the natural construction of the terms of the policy, to apply the exemption to all linseed on board collectively, whether shipped in bulk or in separate packages, and that the warranty could not apply to each bag in which the seed happened to be packed as a distinct object; (i) but where the goods insured were described in the policy as

(e) *Reimer v. Ringrose*, 6 Exch. 267; C. P. 250; 36 ib. 156; *Meyer v. Ralli*, 20 L. J. Ex. 175; *Rosetto v. Gurney*, 11 1 C. P. D. 358.

C. B. 187; 20 L. J. C. P. 257; *Gt. Ind. (g) Entwisle v. Ellis*, 2 H. & N. 555; *Penins. Rail. Co. v. Saunders*, 31 L. J. 27 L. J. Ex. 105; *Davy v. Milford*, 15 Q. B. 206; 1 B. & S. 41; 2 B. & S. 266; East, 559.

Booth v. Gair, 15 C. B. n. s. 291; 33 (h) *Hills v. Lond. Ass. Co.*, 5 M. & L. J. C. P. 99. W. 569.

(f) *Kidston v. Empire Ins. Co., L. R.* (i) *Ralli v. Janson*, 6 Ell. & Bl. 422. 1 C. P. 535; ib. 2 C. P. 357; 35 L. J.

⁶² See Appendix, Vol. III.

"master's effects," and the memorandum was "free from all average," and some of the goods thus insured were totally lost and others were saved, it was held that as the articles which constituted "master's effects" were essentially different in their nature and kind and value, the insurer was liable in respect of the total loss of particular articles constituting "master's effects." To hold that if the insured happens to be successful in rescuing any of the articles insured, even the clothes he may be wearing, he will thereby incur the penalty of forfeiting his insurance on the rest, though they are all totally lost, would lead to a result quite at variance with the object for which the memorandum as to average was introduced into policies. (*k*) As soon as it is ascertained that the goods are of different species, it is as if the different species had been enumerated. (*l*)

If the contents of any particular package, hogshead, &c., separately insured, are not totally destroyed, the loss is then only a partial or average loss, and the underwriters are exempted by the memorandum from liability. (*m*) It is usual, therefore, to modify the effect of the memorandum by an express stipulation to the effect that the underwriters are to pay "average on each species of produce, or package of manufactured goods, or on each ten, fifteen, or twenty hogsheads," &c., so as to give the insured a right to claim for an average or partial loss separately on each species, if the loss amounts to 3 or 5 per cent, although there may not have been a 3 or 5 per cent loss upon the whole. This stipulation does not oust the claim of the assured in respect of a general average loss. (*n*) If several average or partial losses take place under 3 or 5 per cent *each*, but the aggregate amount of the whole exceeds 3 or 5 per cent, the underwriters will be liable. (*o*) Whenever the policy is made free from average under so much per cent, and a loss happens, the proportion which the loss bears to the cargo must be calculated upon the cargo which was on board

(*k*) *Duff v. Mackenzie*, 3 C. B. N. S. 16. (*n*) *Hagedorn v. Whitmore*, 1 Stark. 157.

(*l*) *Wilkinson v. Hyde*, ib. 44.

(*m*) *Hedburg v. Pearson*, 7 Taunt. 154; *Navone v. Haddon*, 9 C. B. 43; 19 L. J. C. P. 161. (*o*) *Blackett v. R. Ex. Ass. Co.*, 2 Cr. & J. 244.

at the time of the loss. (*p*) The petty charges of primage and average, previously mentioned (*ante*, p. * 514) as incident to navigation, form part of the necessary and ordinary expenses of the voyage, and the payment of them is not considered a loss within the meaning of the policy.

Of the Exceptions of General Average Losses and Stranding of the Vessel⁶³ — General average losses arising from general contribution by the owners of property exposed to a common peril of the seas to make good a loss incurred for the preservation of the common property of all (*ante*, pp. * 514, * 515), must be made good by the underwriter under the general terms of the policy; and when they are excepted from the average clause, the underwriter, of course, continues responsible in respect of them, although he is exempted from liability in respect of all other partial or average losses. To the clause "warranted free from average" is frequently annexed, as we have already seen, the exception "unless the ship be stranded." By the stranding of the vessel, under such a clause, the exemption from average is destroyed; and the loss falls within the general words of the policy, although it was not in any wise occasioned by the stranding. (*q*) It is said to be a rule that where a vessel takes the ground in the ordinary and usual course of navigation and management in a tidal river or harbor upon the ebbing of the tide or from natural deficiency of water, so that she may float again upon the flow of the tide or increase of water, such an event is not to be considered a stranding within the sense of the memorandum; but it is otherwise where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual and accidental occurrence. (*r*) Where a ship ran on some wooden piles, four feet under water, which had been erected in a river about nine yards from the shore, to keep up the banks, and lay on such piles until they were cut away, this was held to be a stranding within the policy. (*s*) But if the vessel merely grounds on a rock, and gets off when the tide rises,

(*p*) *Rohl v. Parr*, 1 Esp. 444.

M. & Sc. 657; *Letchford v. Oldham*, 5

(*q*) *Burnett v. Kensington*, 7 T. R. Q. B. D. 538, C. A.

210; *Roux v. Salvador*, 4 Sc. 1.

(*s*) *Dobson v. Bolton*, 1 Park. Ins.

(*r*) *Wells v. Hopwood*, 3 B. & Ad. 34; 239; *Rayner v. Godmond*, 5 B. & Ald. Kingsford v. Marshall, 8 Bing. 458; 1 225.

⁶³ See Appendix, Vol. III.

and pursues her voyage, this is not a stranding, though the vessel may be injured; "if it is touch and go with the ship, [*723] there * is no stranding." (t) But when the ship accidentally takes the ground and remains there for any time, this constitutes a stranding, without reference to the damage sustained by the vessel. (u) If the shore tackling, placed to keep the vessel upright when the tide leaves her, breaks, and she rolls over on her side and is stove in, this is a stranding. (v) Where a ship, having encountered bad weather, and lost both her anchors, and had her masts cut away, was taken in tow by salvors, and placed on a bank out of the ordinary course of the voyage, where she lay on her port side for several tides, and sustained considerable farther injury, it was held that there was a stranding. (x) The stranding of a lighter in which goods are being taken from the ship to the shore, is not a stranding of the vessel within the exception in the policy. (y) The stranding must of course, in all cases, take place during the voyage covered by the policy, and before the risk thereon terminates.

A clause in a policy, "general average as per foreign statement," means that general average in the policy shall include such losses as the law of the port of adjustment regards as intentional sacrifices made for the benefit of the whole adventure, although such losses may not be general average according to English law. (z) The mere temporary suspension of the voyage for repairs at a port of refuge does not warrant an average adjustment at that port as between shipowner and owner of cargo; and the shipowner is not entitled to *pro rata* freight, unless it is shown that the owner of the goods had an option of having them sent on, or of accepting them at that port. (a)

Suing and Laboring Clause. — This clause, in its usual form, is not limited in construction to a case where the assured abandons, or may perchance abandon, so that the expense incurred is not only in respect of a subject-matter in which the underwriters

(t) *Ld. Ellenborough, Macdouglass v. R. Ex. Ass. Co.*, 4 Campb. 283.

(u) *Harman v. Vaux*, 3 Campb. 429; *Barrow v. Bell*, 4 B. & C. 736.

(v) *Bishop v. Pentland*, 7 B. & C. 219.

(x) *De Mattos v. Saunders*, L. R. 7 C. P. 570.

(y) *Hoffman v. Marshall*, 2 Sc. 564.

(z) *Mavro v. Ocean Marine Ins. Co.*,

L. R. 9 C. P. 595; 10 C. P. 414.

(a) *Hill v. Wilson*, 4 C. P. D. 329.

are interested, but upon property which, by the abandonment, actually becomes or may become theirs. It extends to every case in which the subject of insurance is exposed to loss or damage, for the consequences of which the underwriters would be answerable, and in warding off which labor is expended. (b) Where a shipowner has incurred expense for the purpose of averting a loss of freight, he is entitled to recover under the suing and laboring * clause so much thereof as was reasonably incurred. (c) The application of this clause is not excluded by the word "warranted free from particular average." (d) The plaintiff insured a ship with the defendant, which suffered sea damage and incurred salvage expenses. When repaired, the ship was more valuable than when insured. The plaintiff brought his action for a partial loss. There was a suing and laboring clause. It was held that the plaintiff was not entitled to recover a proportion of the salvage expenses in addition to the sum insured; for that salvage (properly so called) and general average expenses do not come within the words or object of a suing and laboring clause. (e)

Valuation and Adjustment of Losses¹—**Valued and Open Policies**—**Over-valued Policies**—**Calculation of the Value**—**Deduction for New Materials.**⁶⁴—The question as to whether there is a total or partial loss is independent of the question whether the policy is valued or not valued. If the whole of the subject-matter covered by the insurance is lost, it is a total loss; if a part only is lost, the loss is a partial loss, the amount of which depends on the proportion the part lost bears to the whole subject-matter of the insurance. Thus if the policy is a valued policy, the value being admitted, the assured is entitled to be

¹ As to the adjustment of losses, see 2 Pars. Mar. Ins. c. 6, and c. 7, sect. 4; 2 Phillips, Ins. c. 21; U. S. Dig. tit. *Insurance*, sect. 1545; Hine & Nichols, New Dig. Ins. 23; Sansum, Dig. Ins. 87, 619, 891. As to assignment, see *National Exchange Bank v. McLoon*, 73 Me. 498.

(b) *Kidston v. Empire Insurance Co.*, L. R. 1 C. P. 535; 2 C. P. 357; 36 L. J. L. R. 1 C. P. 535; 2 C. P. 357; 36 L. C. P. 156; *Meyer v. Ralli*, 1 C. P. D. J. C. P. 156. 358.

(c) *Lee v. The Southern Insurance Co.*, L. R. 5 C. P. 397. (e) *Aitchison v. Lohre*, 4 Ap. Cas. 755.

(d) *Kidston v. Empire Insurance Co.*,

⁶⁴ See Appendix, Vol. III.

indemnified to the extent of the declared value in the policy, and is released, as previously mentioned, from proving the value, unless the valuation can be impeached by the underwriter. If the policy be an open policy, the value of the whole subject-matter of insurance must be proved. (*f*) If the policy can be shown to have been fraudulently overvalued, it will be void (*ante*, pp. * 675, * 676). But if the declared value exceeds the interest of the assured through some mistake or misapprehension, the loss will be adjusted in the same manner as if the policy were an open policy, and the computation be made by the real interest on board, and not by the value in the policy. (*g*) Where several valued policies of insurance are effected upon the same vessel valued differently, and upon a total loss occurring, the insured receives under some of the policies part of the sums insured, in an action upon another policy he is only entitled to recover the difference between the amount received and the agreed value in that policy. (*h*) If the policy be an open policy

on a ship, the value is taken to be the sum the ship is [* 725] worth to the owner at * the port where the voyage commences, including stores, furniture, provisions, wages, advances to sailors, and all expenses of outfit, to which are added the premium and costs of insurance. If it be an open policy on goods, the value is taken to be the prime cost of the goods as proved by the invoices and tradesmen's bills, adding thereto the shipping charges and premium, and costs of insurance. The presumed value of the goods, if they had reached their place of destination and been sold there, has nothing to do with the calculation of the outset value. The insurer has nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the goods. If they be totally lost, he must pay the prime cost, that is, the value of the thing he insured at the outset; he has no concern in any subsequent value. (*i*) If the policy is a valued policy on a ship at and from A to B, and the ship while at A undergoing repairs is burnt so as to

(*f*) *Tobin v. Harford*, 34 L. J. C. P. P. D. 757, C. A.; see, however, *Barker v. Janson*, *ante*, p. * 676.

(*g*) *Le Cras v. Hughes*, 3 Dong. 81; (*h*) *Bruce v. Jones*, 1 H. & C. 769; *Williams v. North China Ins. Co.*, 1 C. 32 L. J. Ex. 132.

(*i*) *Lewis v. Rucker*, 2 Burr. 1170.

become a total loss, the underwriter is not entitled to deduct from the value the estimated expense of the repairs necessary to make the ship seaworthy for the voyage, but must pay the total agreed value. (*k*) If a ship insured has sustained a partial loss, as, for instance, if she has been damaged, and the damage has been repaired by the owner, the latter will not be allowed to receive from the underwriter more than two thirds of the costs of the repairs, it being considered that a deduction of one third ought to be made in favor of the underwriters, by reason of the owner's having the benefit of new materials instead of old, (*l*) unless the vessel is on her first voyage. (*m*)

Of the Standard of Value and Measure of Depreciation. — If a partial loss has been sustained on goods and merchandise, this loss is calculated and adjusted by comparing the selling price of the sound commodity with the selling price of the damaged part of the same commodity at the port of delivery. The difference between these two subjects of comparison affords the proportion of loss in any given case, *i. e.* it gives the aliquot part of the original value which may be considered as destroyed by the perils insured against, and for which the insured is entitled to be recompensed. When this is ascertained, it only remains to apply this liquidated portion of loss to the standard by which the value is calculated (*i. e.* to the declared value in the case of a valued policy, and to the invoice price, &c., in the case of an open policy), “and you then get the one half, the one fourth, or one eighth of the loss to be made good in terms of money.” (*n*) If part of the cargo, *capable of a several [* 726] and distinct valuation at the outset, be totally lost, as if there be one hundred hogsheads of sugar, and ten happen to be lost, the insurer must pay the prime cost of those ten hogsheads, without any regard to the price for which the other ninety may be sold. But where one hogshead happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantity of such damage; but if you can fix whether

(*k*) *Lidgett v. Secretan*, L. R. 6 C. P. 416.

(*l*) *Poingdestre v. R. Ex., R. & M.* 378; *Da Costa v. Newnham*, 2 T. R. 412.

(*m*) *Pirie v. Steele*, 2 Mood. & Rob. 49.

(*n*) *Usher v. Noble*, 12 East, 647.

it be a third, fourth, or fifth worse, the damage is fixed to a mathematical certainty. This is to be found out, not by any price at the outset port, but at the port of delivery, where the voyage is completed and the whole damage known. Whether the price there be high or low, it equally shows whether the damaged goods are a third, a fourth, or a fifth worse than if they had come sound: consequently, whether the injury sustained be a third, fourth, or fifth of the value; and as the insurer pays the whole prime cost if the thing be wholly lost, so if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth of the value of the goods so damaged. For instance, suppose the value in the policy to be £30, the goods are damaged, but sell for £40; if they had been sound, they would have sold for £50. The difference, then, between the sound and the damaged is a fifth: consequently, the insurer must pay a fifth of the prime cost or value in the policy, that is, £6; *e converso*, if they come to a losing market and sell for £10, being damaged, but would have sold for £20 if sound, the difference is one half, and the insurer must pay half the prime cost or value in the policy, that is, £15. (o) To put the matter in another shape: "If goods valued at £100, and coming to a good market, would, if sound, have been sold for £120, but are so damaged as not to fetch more than £40, the loss will be that proportion of the prime cost (£100) which the difference between the price of the damaged and the price of the sound goods (£80) bears to the price of the sound, £120. Thus if £120 : £80 :: £100 : — the answer is £66 13s. 4d., the true loss." (p) This mode of calculation furnishes a criterion by which the amount of the deterioration on the damaged goods may be ascertained, without involving the underwriter in the fluctuations of a rising or falling market. The merchant in this way makes the market prices of the sound and damaged commodity serve "as the scales in which to weigh the depreciation." (q)

Liabilities of Underwriters with Reference to the Amount of their Subscriptions. — The underwriters are liable for total or

(o) *Lewis v. Racker*, 2 Burr. 1170. *Harry v. R. Ex. Ass. Co.*, 3 B. & P.

(p) *Marshall on Insurance*, 634, 3d ed.; *Johnson v. Sheddon*, 2 East, 581; 308; *Tunno v. Edwards*, 12 East, 488.

(q) *Stevens on Average*, 84.

average losses in proportion to the sums they have underwritten. Thus if * a man underwrite £100 upon [* 727] property valued at £500, and a total loss happen, he shall pay £100, that being the amount of his subscription; and if only an average loss, amounting to £60 or £70 per cent, then he shall pay only £60 or £70, being his proportion of the loss. The liability of the underwriter is not restricted to the amount of his subscription; for he may be subject to an average and a total loss in the same voyage, or for several average or partial losses, amounting together to more than his subscription. (*r*) But the insured cannot, of course, in any case, recover anything beyond that which is a strict indemnity for losses actually sustained. If several articles be insured for one sum, with a distinct valuation on each, or so much upon ship and so much upon cargo, and no part of the cargo be taken on board, so that the risk upon that never attaches, the insured will recover only such a portion of the sum insured as the value of the article lost bore to the value of the whole. (*s*) In the case of open policies on freight, the usage is to calculate the loss upon the gross amount, and not upon the net value of the freight. (*t*) When part of the goods insured is saved, and the salvage exceeds the amount of the freight, the practice is to deduct the freight from the value of the goods saved, and to make up the loss upon the difference. (*u*)

Signed Adjustments.—When an adjustment has been made of the amount of the loss, and indorsed upon the policy and signed by the underwriter, this binds the latter, unless he can show that it was made on wrong information, or under a mistake, or under the influence of misrepresentations. (*x*) The adjustment is not an absolute and final settlement which is to be conclusively binding upon the parties; (*y*) but when the underwriter has once settled for the loss, he cannot recover back the money he has paid, unless there has been actual fraud on the part of the insured. If he pays for a total loss, which afterward turns out to have been only an average loss, he cannot

(*r*) *Le Cheminant v. Pearson*, 4 Taunt. 367; *Brooks v. M'Donnell*, 1 Y. & C. 515.

(*s*) *Amery v. Rogers*, 1 Esp. 208.

(*t*) *Palmer v. Blackburn*, 1 Bing. 62.

(*u*) *Boyfield v. Brown*, 2 Str. 1065.

(*x*) *Herbert v. Champion*, 1 Campb. 134; *Shepherd v. Chewter*, ib. 274; *Gammon v. Beverley*, 8 Taunt. 124.

(*y*) *Luckie v. Bushby*, 13 C. B. 878.

recover back his money, but must do the best he can with the property saved. (z)

Right of the Insurer to recover Compensation where the Loss or Damage has been caused by the Negligence of a Third Party.⁶⁵

— After satisfaction made to the owner for the loss or damage, the insurer stands in the place of the insured, and is not only entitled to what can be saved or restored *in specie*, but also to compensation, when compensation is recoverable, for [* 728] the injury ; (a) and he is therefore * entitled to sue the wrong-doer in the name of the owner of the lost or damaged property, in order to recover compensation for such loss or damage. (b) If the policy is a valued policy, the damages recovered will belong wholly to the underwriter, although the real value of the ship may exceed that stated in the policy. (c)

Non-Inception of the Risk — Over-Insurance by Mistake — Return of the Premium.¹⁶⁶ — If the risk upon the policy never commences, the premium paid to the underwriter is recoverable by the insured, unless the policy has been rendered void by some positive fraud on the part of the latter. Where the risk has not been run, whether owing to the fault, pleasure, or will of the insured, or to any other cause, the consideration for the premium fails ; but if the risk of the contract has once commenced, there can be no apportionment or return of the premium afterward. (d) If there are separate voyages and several risks to be run, some of the premiums may be returnable and others not ; but if there is one entire voyage and one risk, and the risk has commenced, there can be no return of premium. (e) If the vessel sails in an unseaworthy condition, and there is no fraudulent representation or warranty of seaworthiness in the policy, and no evidence of fraud, the premium is returnable, as the underwriter's risk upon

¹ 1 Pars. Mar. Ins. 505 ; 2 Phillips, Ins. c. 22 ; U. S. Dig. tit. *Insurance*, sect. 1718 ; Sansum, Dig. Ins. sect. 1226 ; Hine & Nichols, New Dig. Ins. 560.

(z) *Da Costa v. Firth*, 4 Burr. 1966.

(c) *North of England, &c. Ins. Ass.*

(a) *Randal v. Cockran*, 1 Ves. Sen. 89 ; *Dickenson v. Jardine*, L. R. 3 C. P. 639.

v. Armstrong, L. R. 5 Q. B. 244.

(d) *Stevenson v. Snow*, 3 Burr. 1238 ; *Tyrie v. Fletcher*, 2 Cowp. 666 ; *Loraine*

(b) *Mason v. Sainsbury*, 3 Doug. 64 ; *Yates v. Whyte*, 5 Sc. 640 ; *post*, p. * 737.

v. Thomlinson, 2 Doug. 585.

(e) *Bermon v. Woodbridge*, 2 Doug. 781.

the policy never commenced, by reason of the seaworthiness of the vessel being, as we have before seen, a condition precedent to his liability. (*f*) If the policy be on goods to be laden on board the particular vessel, and no goods are put on board, the premium is returnable; (*g*) and if part of the goods covered by the policy only are put on board, a portion of the premium corresponding with the deficiency may be claimed back. (*h*) But if the policy be on freight, the risk may, as we have seen (*ante*, p. * 705), attach, although no goods have been put on board; and if the risk once attaches, the premium cannot be recovered back. (*i*) Where several policies have been effected, and before the risk thereon has commenced, the interest turns out to be less than the amount insured on the whole, the insured is entitled to a reasonable return of premium upon all the policies; but where an insurance has been effected by one or more policies, and the risk has commenced, and subsequent policies are afterward signed, and a loss happens between the signing of the first and subsequent policies, the underwriters on the first will be liable in proportion to their subscriptions to the extent of the whole * sum insured, and, therefore, the risk having [* 729] been incurred by them, a return of the premium cannot be claimed. (*k*) Where property has by mistake been insured for more than it is worth, the underwriter is bound to return the overplus premium; and whenever it is established to be the custom and usage of trade to return a certain portion of the premium upon certain contingencies, the insured will be entitled to avail himself of the custom. (*l*) Clauses are frequently inserted in policies expressly providing for a return of part of the premium in certain events and contingencies. (*m*) Where an insurance was effected on a ship for a year, and part of the premium was to be returned "for every uncommenced month if sold or laid up," and the vessel had been laid up for several months within the year, but was employed again within the year, this was held

(*f*) *Penson v. Lee*, 2 B. & P. 330.(*k*) *Fisk v. Masterman*, 8 M. & W.(*g*) *Martin v. Sitwell*, 1 Show. 151. 165.(*h*) *Horneyer v. Lushington*, 15 East,(*l*) *Long v. Allen*, 2 Park. Ins. 797.

46.

(*m*) *Aguilar v. Rodgers*, 7 T. R. 421.(*i*) *Moses v. Pratt*, 4 Campb. 298.

not to be such a laying up as entitled the insured to a return of premium. (n)

Void Policy — Return of the Premium.⁶⁷ — If a policy is rendered null and void by reason of a written misrepresentation or misstatement made by the insured by mistake and without fraud, the insured will be entitled to a return of his premium. (o) But if the insured has effected a fraudulent insurance, with the view of cheating the underwriters, the law will not enable him to recover back the premium he has paid. (p) If the insurance is illegal, as, for instance, if it has been effected upon an unlawful voyage or adventure, such as a smuggling enterprise, or a trading with foreign enemies, or a trading in breach of the navigation laws, and is consequently void, the premium cannot be recovered back if the unlawful voyage or adventure has been undertaken, and both parties are *in pari delicto*; but there is a *locus penitentiae* so long as the contract continues executory. (q) And if an insurance be effected on a trading adventure with foreign enemies, and be consequently illegal in its inception, so that the risk never commences, yet, if it was always in the contemplation of the parties to obtain a license legalizing the trade, and they intended to insure a legal and not an illegal voyage, but from some mistake or misapprehension the license was not obtained in sufficient time to legalize the adventure and enable the insured to recover upon the policy, the premium paid for such insurance is recoverable, as there was no intention on [* 730] the part of the insured to violate the law. (r) So if * the insured was ignorant of the illegality of the voyage at the time he effected the insurance and paid the premium, as, for instance, if he did not know that hostilities had broken out, and that the parties with whom he was trading had at the time become foreign enemies, the premium is recoverable. (s) Non-compliance with the requirements of the Merchant Shipping Acts respecting the engagement of the crews of British vessels does

(n) *Hunter v. Wright*, 10 B. & C. 714.

(o) *Feise v. Parkinson*, 4 Taunt. 640.

(p) *Chapman v. Fraser*, 1 Park. Ins. 456.

(q) *Johnston v. Sutton*, 1 Doug. 254; *Lubbock v. Potts*, 7 East, 449.

(r) *Hentig v. Staniforth*, 5 M. & S. 124.

(s) *Oom v. Bruce*, 12 East, 225.

not render the voyage illegal, but only furnishes ground for proceedings against the master for the breach of the statute. (*t*) On the sale of a thing insured, no interest in the policy passes to the vendee, unless at the time of the sale the policy is assigned either expressly or impliedly. (*u*)

SECTION III.

OF FIRE INSURANCE.

Of Contracts of Insurance against Peril of Fire.¹—When the underwriter, in consideration of a premium, undertakes to indemnify the insured against loss of or injury to property from fire, the contract is a contract of fire insurance, and the instrument by which it is effected is called a FIRE POLICY.⁶⁸ In a contract of this kind, the insurers, after reciting the receipt of the premium, usually covenant or agree that, from a day named in the policy unto and inclusive of another day named therein, and so long as the insured shall pay or cause to be paid the premium agreed upon, and the insurer shall accept the same, they, the insurers, will make good any loss or damage by fire to the

¹ On the subject of insurable interest generally, consult Bates, Dig. F. Ins. (1873) 349; Clement, Supplement (1882), 150, 396; Hine & Nichols, New Dig. Ins. (1882) 261, 700; May, Ins. (1882) c. 4; Sansum, Dig. Ins. (1876) sects. 688, 1373; Wood, F. Ins. (1878) c. 8; U. S. Dig. tit. *Insurance*, I. 1; Ann. Dig. tit. *Insurance*; Baxter v. Hartford Fire Ins. Co., 12 Fed. Reporter, 481. Since 1871 the decisions on life insurance have been comprehensively republished in the Insurance Law Journal.

Alienation of the subject of insurance as a defence to any claim by the insured on the policy, Lane v. Maine Mut. Fire Ins. Co., 12 Me. 44, 28 Am. Dec. 150, and note by A. C. Freeman, ib. 154; Oakes v. Manufacturers' Fire, &c. Ins. Co., 131 Mass. 164. Relative interests of mortgagor and mortgagee, see May, Ins. c. 10; Wood, F. Ins. c. 9; Bates, Dig. F. Ins. 56; Clement, Supplement, 23, 389; Hine & Nichols, New Dig. Ins. 63, 696; Sansum, Dig. Ins. sect. 95; Wheeler v. Insurance Co., 101 U. S. 439.

(*t*) Redmond v. Smith, 8 Sc. N. B. North of England Oil-Cake Co. v. Archangel Insurance Co., L. R. 10 Q. B. 268.

(*u*) Powles v. Innes, 11 M. & W. 10; 249.

⁶⁸ See Appendix, Vol. III.

property insured, except loss or damage from fire caused by foreign enemies, &c. When the policy refers to printed proposals, as embodying the terms upon which the insurance is effected, these proposals form part of the contract, and the policy and proposals must be read and construed together. The insured must have a pecuniary interest in the property exposed to risk, or he must be accountable or responsible to some person for the safety or security of the property. (a) If he has no such interest or accountability, the contract will be void at common law, independently of the 14 Geo. III. c. 48, as being contrary to * public policy, and holding out the strongest possible temptation to arson; but it is not necessary, to give the insured an insurable interest, that he should have the absolute property in the things insured. If he has a lien on them for money due to him, or if he holds them as a bailee, or depositary, or warehouseman, or as a commission-agent for sale, or as an artificer, or a common carrier, or is employing his work and labor upon them, he may lawfully insure them to their full value as goods held in trust or on commission, and may keep up a floating policy upon them for his own benefit and the benefit of his present and future customers. (b) Where, however, the insurers had specially limited their liability to "goods on trust or on commission for which the insured are responsible," it was held that they were not liable for loss to goods sold, and in which the property had passed to the purchaser, although the insured held the delivery warrants for the convenience of paying the charges on the goods which were in bond. (c) If the insured is a bankrupt in possession of after-acquired property by permission of his trustee, he has an insurable interest. (d)

Parties entitled to the Benefit of the Insurance.⁶⁹—By the 22 & 23 Vict. c. 35, sect. 7, it was enacted that the person entitled to the benefit of a covenant to insure against loss or damage

(a) *Marks v. Hamilton*, 7 Exch. 323; 21 L. J. Ex. 109.

(b) *Tasker v. Scott*, 6 Taunt. 234; 1 Marsh. 556; *Lond. & North-West. Ry. Co. v. Glyn*, 28 L. J. Q. B. 193; 1 El. & El. 652; *Waters v. Monarch Insurance Co.*, 5 Ell. & Bl. 870; 25 L. J. Q. B. 102.

(c) *North British Ins. Co. v. Moffat*, L. R. 7 C. P. 25; 41 L. J. C. P. 1; and see *Martineau v. Kitchen*, L. R. 7 Q. B. 436, 457; 41 L. J. Q. B. 227.

(d) *Marks v. Hamilton*, 7 Ex. 323; 21 L. J. Ex. 109.

by fire, shall have the same advantage from any insurance not effected in conformity with the covenant as he would have from an insurance effected in conformity with the covenant. This section has been repealed by the 44 & 45 Vict. c. 41, sect. 14, and Sch. II., Part I., and its place is practically supplied by the relief against forfeiture contained in sect. 14 of the above act. (e) A purchaser of property insured against fire does not by the purchase acquire a right to the benefit of the policy. (f) Where machinery was mortgaged by a bill of sale which contained a covenant to insure, but no provision for the application of the policy moneys in case of fire, in liquidation of the mortgage debt, and the machinery was burnt, it was held that the mortgagee had no claim to the benefit of the policy as against the mortgagor. (g) So also a lessee with an option of purchase has no right after a fire to exercise his option and claim the insurance money. (h)

Things covered by the Policy.⁷⁰—An insurance on "household * furniture, linen, and wearing apparel," will [* 732] not include linen-drapery bought on speculation; (i) nor will an insurance on the "interest in an inn" include the profits of the publican's trade;¹ (k) nor an insurance on "an oil-mill and millwright's gear therein" include machinery in a separate detached building, although it is worked by the same moving power and considered to be part of the mill. (l) If a building be described as of one class instead of another requiring a larger premium, the policy will be nugatory. (m)

¹ As to description of property insured, see article on Policies of insurance on personal property "contained in, &c.," by W. H. Whittaker, 25 Alb. L. J. 446; overvaluation, *Miller v. Alliance Ins. Co.*, 7 Fed. Reporter, 649. If words peculiar to the trade or business of the insured are used in describing his stock of goods, &c., it will be presumed that they were used in their technical sense. *Houghton v. Watertown Fire Ins. Co.*, 131 Mass. 300.

Fire policies to be construed liberally or favorably to the insured. *Crane v. City Fire Ins. Co.*, 3 Fed. Reporter, 558; *Stout v. Commercial Union Assurance Co.*, 12 ib. 554; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300.

(e) See *ante*, p. *261.

(i) *Watchorn v. Langford*, 3 Campb.

(f) *Poole v. Adams*, 33 L. J. Ch. 422.

639.

(k) *Wright v. Pole*, 1 Ad. & E. 621.

(g) *Lees v. Whiteley*, L. R. 2 Eq.

(l) *Hare v. Barstow*, 8 Jur. 928.

143; 35 L. J. Ch. 142.

(m) *Newcastle Fire Ins. Co. v. Mac-*

(h) *Edwards v. West*, 7 Ch. D. 858. *morran*, 3 Dow. 255.

⁷⁰ See Appendix, Vol. III.

Warranties.¹ — Every statement, condition, and representation material to the risk will amount to a warranty, but not statements and representations concerning matters which do not form the basis of the contract and regulate the risk. (n) ⁷¹

Alteration of Premises increasing the Risk.² — In every policy of insurance against fire there is an implied promise or undertaking on the part of the insured that he will not, after the making of the policy, alter the premises so as to increase the risk. If he converts a house of two stories into a house of three stories, the liability of the insurer is increased; the premium, if previously fair, has then become inadequate, and the underwriter is discharged. (o) ⁷² It has been held that if it is stated or asserted in the description of the premises in the policy "that no fire is kept on the premises, and no hazardous goods deposited thereon," this refers merely to the ordinary state and condition of the property; and if on some particular occasion, for some temporary purpose, fire is brought upon the premises, or hazardous goods are temporarily or casually placed thereon,

¹ Upon the subject of warranties and representations, see *May*, Ins. c. 6, 7; *Wood*, F. Ins. c. 5; *Bates*, Dig. F. Ins. 630, 709; *Clement*, Supplement, 306, 354, 508; *Hine & Nichols*, New Dig. Ins. 604, 684, 709; *Sansum*, Dig. Ins. sects. 1373, 1512; U. S. Dig. tit. *Insurance*; *Ramsey v. Phoenix Ins. Co.*, 2 Fed. Reporter, 429.

² Consult *May*, Ins. c. 9; *Wood*, Fire Ins. c. 7; *Bates*, Dig. F. Ins. 84, 332; *Clement*, Supplement, 36, 143; *Hine & Nichols*, New Dig. Ins. 565, 711; *Sansum*, Dig. Ins. sect. 649; U. S. Dig. tit. *Insurance*, sect. 1872; see also *Crane v. City Ins. Co.*, 3 Fed. Reporter, 558.

Cases in which a company has defended on the ground that the insured allowed the premises to become "vacant," "unoccupied," &c., contrary to a warranty in the policy, or allowed them to be used in some forbidden or unlawful way. *Behler v. German Mut. Fire Ins. Co.*, 68 Ind. 347; *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457; *American Ins. Co. v. Foster*, 92 Ill. 334; *Western Assurance Co. v. Mason*, 5 Bradw. 141; *Wakefield v. Orient Ins. Co.*, 10 Ins. L. J. 249; *Cook v. Continental Ins. Co.*, 70 Mo. 610; *Whitney v. Black River Ins. Co.*, 72 N. Y. 117; *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184; *Woodruff v. Imperial Fire Ins. Co.*, 11 N. Y. Week. Dig. 366; *Hermann v. Adriatic Fire Ins. Co.*, 12 ib. 293, 85 N. Y. 162; *Miaghan v. Hartford Fire Ins. Co.*, 24 Hun, 58; *McClue v. Watertown Fire Ins. Co.*, 90 Pa. St. 277; *Blumer v. Phoenix Ins. Co.*, 48 Wis. 535; *Ramsay v. Phoenix Ins. Co.*, 2 Fed. Reporter, 429; *Poor v. Hudson Ins. Co.*, ib. 433; *Albion Lead Works v. Williamsburg City Fire Ins. Co.*, ib. 479.

(n) *Benham v. Un. Guar. &c.*, 7 (o) *Sillem v. Thornton*, 3 Ell. & Bl. Exch. 744; *Baxendale v. Harvey*, 4 H. 882; 23 L. J. Q. B. 368. & N. 450; s. o. nom. *Baxendale v. Harding*, 28 L. J. Ex. 236.

and a loss by fire consequently occurs, the policy is not forfeited, and the underwriters are not discharged. (*p*) Where premises were insured as "a granary and kiln for drying corn," and the policy was to be void if the premises were not accurately described, or any alteration was made in the building, or the risk was increased, and on one occasion, in consequence of a barge laden with bark having been sunk in the adjoining river, and the bark wetted, the assured permitted the bark to be dried gratuitously in the kiln, and the bark and kiln took fire, and the whole premises were destroyed, it was held that the underwriters were nevertheless liable upon the policy to make good the loss, on the ground that the stipulation as to subsequent alterations in the premises or the risk referred to something permanent and habitual,* and not to a temporary matter; and [* 733] it was observed that if the plaintiff had either dropped his business of corn-drying and taken up that of bark-drying, or added the latter to the former, the case would have come within the condition. (*q*)

Notice of Alterations.⁷³ — If by the terms of the policy the insured is to give notice of the erection or use of new stoves or furnaces, or of the making of any alterations increasing the risk, and pay an increased premium, this, it has been held, refers to some permanent alteration or user, and not to a mere temporary or casual matter. (*r*) But the authority of these cases is somewhat doubtful; and it has been held that where by the terms of the policy, steam-engines, stoves, or any description of fire-heat other than common fireplaces, are not to be used unless notice has been given and the use allowed, the policy will be avoided if a steam-engine, with furnace attached, is brought on the premises, and used only on one or two occasions for experimental purposes, and not in the business of the insured; (*s*) but it must be proved that the risk of fire was increased by the thing done. (*t*)

(*p*) *Dobson v. Sotheby*, M. & M. 90. (*s*) *Glen v. Lewis*, 8 Exch. 617; 22 See, however, *post*, p. * 733, Notice of L. J. Ex. 228.

Alterations. (*t*) *Stokes v. Cox*, 1 H. & N. 533; 26

(*q*) *Shaw v. Robberds*, 6 Ad. & E. 83. L. J. Ex. 113.

(*r*) *Pim v. Reid*, 6 Sc. N. R. 982;

Barrett v. Jermy, 3 Exch. 545.

⁷³ See Appendix, Vol. III.

Misdescription of the Insured Premises.⁷⁴—Where by the terms of a policy, the houses, buildings, or other places where insured goods were deposited were to be accurately described, and a lodger who had only one room in a house effected an insurance upon goods therein, describing them as being in his “dwelling-house,” it was held that the description was sufficiently accurate. (u)¹ A coffee-house keeper who does not furnish beds and lodgings for the night does not carry on the trade of an inn-keeper within the meaning of a policy enumerating the trade of an inn-keeper as doubly hazardous, and requiring an increased premium for the insurance of buildings where it is carried on. (x) When mills are warranted to be worked by day only, and they are put in motion by means of shafts worked by steam power in an adjoining building, the warranty is not broken by the steam-engine and shafts being kept going all night to turn other mills, if it appears that the machinery of the insured mill was disconnected at night from the movable shafts, and that the mill itself had ceased to work. (y)

Fraudulent Concealment of Circumstances materially affecting the Risk.²—If any unusual and extraordinary risk is known by the assured to exist at the time the policy is effected, [*734] and is not *disclosed to the underwriter, this is a fraudulent concealment, which deprives the insured of all right of action upon the policy.⁷⁵ Where a warehouse adjoining a boat-builder's shop took fire, and the fire was apparently extinguished, and the boat-builder sent immediate instructions for the insurance of his shop and premises, without communicating the fact of the neighboring fire to the insurers, and the fire was not in fact extinguished, but broke out again on the

¹ See *ante*, p. *731, American note.

² Wood, *Fire Ins.* c. 6; May, *Ins.* c. 8; Bates, *Dig. F. Ins.* 172; Clement, *Supplement*, 64, 391; Hine & Nichols, *New Dig. Ins.* 153; Sansum, *Dig. Ins.* sect. 235; U. S. *Dig. tit. Insurance*, sects. 249, 1841; *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545; *Waller v. Northern Assurance Co.*, 10 Fed. Reporter, 232; *Perry v. Faneuil Hall Ins. Co.*, 11 Fed. Reporter, 482; *Lasher v. St. Joseph Fire, &c. Ins. Co.*, 86 N. Y. 423.

(u) *Friedlander v. Lond. &c.*, 1 M. & Rob. 171.

(y) *Whitehead v. Price*, 2 C. M. & R. 447; *Mayall v. Mitford*, 6 Ad. & E. 670.

(x) *Doe v. Laming*, 4 Campb. 76.

following morning, and extended to the boat-builder's shop and premises and consumed them, it was held that the concealment of the increased risk, from the recent existence of the adjoining fire, avoided the policy. (z)

Risks covered by the Policy.¹⁷⁶—As the insurers take upon themselves only the risk of fire, they will not be responsible unless there has been actual ignition of the property insured. If it has been damaged merely from atmospheric concussion caused by an explosion of gunpowder at a distance, (a) or from the heat or smoke of ordinary flues and chimneys which have been overheated and mismanaged, and there has been no outbreak of fire, they will not be responsible upon the policy. (b) Where it was provided that the insurers should not be liable if the property should be burnt "by foreign enemies, or any military or usurped power," and it was set on fire by a mob excited by the high price of provisions, it was held that this was not a burning by an usurped power within the meaning of the proviso. (c) But if the insurers exempt themselves from liability for losses by fire "happening from civil commotion," they will not be responsible for damage resulting from the incendiarism of a rebellious mob, or from the insurrection of the people. (d) The insurer who has paid a loss of this kind may sue the hundred upon the Riot Act in the name of the insured. (e) A policy contained an exception of "loss or damage by explosion, except for such loss or damage as shall arise from explosion of gas." An explosive vapor escaped and caught fire, setting fire to other

¹ May, Ins. c. 18; Wood, Fire Ins. c. 2; Bates, Dig. F. Ins. 589; Clement, Supplement, 290; Hine & Nichols, New Dig. Ins. 562, 711; Sansum, Dig. Ins. sect. 979; U. S. Dig. tit. *Insurance*, sects. 315, 1850. See article on Severability of insurance, 25 Alb. L. J. 224.

Losses by explosions. Washburn v. Farmers' Ins. Co., 2 Fed. Reporter, 304; Washburn v. Miami Valley Ins. Co., ib. 633; article on Liability of insurers against fire, for loss resulting from explosions, 18 Alb. L. J. 426.

(z) Bufo v. Turner, 6 Taunt. 338.

(d) Langdale v. Mason, 2 Park. Ins.

(a) Everett v. Lond. Ass. Co., 19 C. 965.

B. x. s. 126; 34 L. J. C. P. 299.

(e) Clark v. Hundred of Blything, 2

(b) Austin v. Drewe, 6 Taunt. 436.

B. & C. 254; Yates v. Whyte, 5 Sc.

(c) Drinkwater v. Lond. Ass. Co., 2 Wils. 363.

⁷⁶ See Appendix, Vol. III.

things; it afterward exploded and caused a further fire, besides doing damage by the explosion; and it was held that the word "gas" meant ordinary coal gas, and did not include the explosive vapor, and that the exemption applied to the damage caused by the subsequent explosion and its consequences just as much as to a fire originated by explosion. (*f*)

Where a ship was insured for three months against [* 735] fire, and * was described as lying in the Victoria wet docks, with liberty to go into a dry dock for repairs, it was held that she was covered by the policy whilst passing along the Thames, in her way from the wet dock to the dry dock, but not whilst she was lying in the river for the purpose of re-fixing her paddle-wheels, or for purposes of repair. (*g*) And where the risk was stated to be on four pumps "at and from Ardrossan to the steamer ashore at Drogheda, and while there engaged at the wreck and until again returned to Ardrossan," &c., it was held that this did not include the risk while the pumps were on board the wreck on a voyage to Belfast, a port of safety. (*h*)

Under the words "from the 14th of February until the 14th of August," the whole of the 14th of August was held to be included. (*i*)

Fires caused by Negligence — Extraordinary Risks.⁷⁷—One of the objects of insurance against fire is to guard against the negligence of servants and others; and therefore the simple fact of negligence has never been held to constitute a defence against the claim of the insured; and there is no distinction between the negligence of servants and agents and of the insured himself. (*k*) But the underwriters do not take upon themselves extraordinary risks, unless those risks are expressly brought to their notice, and are accepted and insured against by them at the time the policy is effected.

(*f*) *Stanley v. The Western Insurance Co.*, L. R. 3 Ex. 71.

(*h*) *Wingate v. Foster*, 3 Q. B. D. 582.

(*g*) *Pearson v. Commerce Un. Ass. Co.*, 15 C. B. n. s. 304; 33 L. J. C. P. 85; L. R. 8 C. P. 548; 1 Ap. Cas. 498; ante, p. * 695.

(*i*) *Isaacs v. Royal Ins. Co.*, L. R. 5 Ex. 296.

(*k*) *Busk v. R. Ex. Ass. Co.*, 2 B. & Ald. 73.

Notice of Loss¹ — **Partial Losses**.⁷⁸ — By the terms of most contracts for insurance against fire, the insured is required to give, within a certain number of days, notice of the loss to the insurers, and to deliver full particulars of the damage sustained, and prove the amount of it, and procure a certificate of his character and circumstances from the minister and churchwardens, or certain reputable inhabitants of the parish; and the strict performance of these things in point of time, and the substantial performance of them in other respects, constitute a condition precedent to the right of the insured to be indemnified for his loss. (*l*) By the term "full particulars" is meant the best particulars the insured can reasonably give. (*m*) When a partial loss only has been sustained of the property insured, the insured is, of course, entitled only to be indemnified to the extent of such partial loss. To * permit him to recover [*736] more, and put himself in a better situation than he was in before the loss occurred, would, as previously observed, be totally opposed to the nature of a contract of insurance as a mere contract of indemnity. If a reasonable suspicion exists that houses or buildings situate within the bills of mortality have been insured for more than their value and fired, but proof is wanting, the insurers may rebuild or repair at their own expense, and resist the claim of the insured for the money secured by the policy. (*n*)

Forfeiture of the Policy — Non-Payment of Premium² — **Days of Grace**.⁷⁹ — Where the insurance is for a year, and so on from

¹ On the subject of notice and proof of loss, consult Bates, Dig. F. Ins. 406, 512; Clement, Supplement, 214, 251, 399, 403; Hine & Nichols, New Dig. Ins. 352, 492, 704, 709; Sansum, Dig. Ins. sects. 831, 1102; May, Ins. c. 20; U. S. Dig. tit. *Insurance*, sects. 522, 1901; *Gauche v. London, &c. Ins. Co.*, 10 Fed. Reporter, 347. Clause in policy requiring insured to give notice of loss "forthwith," or "as soon as possible," means within a reasonable time, and is equivalent simply to a requirement of due diligence. *Scammon v. Germania Ins. Co.*, 101 Ill. 621; May, Ins. c. 15; Wood, F. Ins. 65, 79, 176; Bates, Dig. F. Ins. 481; Clement, Supplement, 246, 403; Hine & Nichols, New Dig. Ins. 452; Sansum, Dig. Ins. sect. 900; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300.

² A premium note given to a company which has not acquired authority to do business within the State, lacks consideration; but if the note recites the issuing

(*l*) *Roper v. London*, 28 L. J. Q. B. 260; 1 El. & El. 825; *Worsley v. Wood*, 22 L. J. Ex. 336.

6 T. R. 710.

(*m*) *Mason v. Harvey*, 8 Exch. 819;

(*n*) *Vernon v. Smith*, 5 B. & Ald. 1.

78, 79 See Appendix, Vol. III.

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year to year, or for a quarter of a year, and so on from quarter to quarter, it is not kept alive after the expiration of the year or quarter by a mere proviso or condition giving a certain number of days of grace for the payment of the premium; but there should be an express stipulation that the insurance shall be continued and the property covered by the policy, until the expiration of the days of grace. (o) Where a policy of insurance against loss by fire from year to year provided that the insured should, "as long as the managers agreed to accept the same, make all future payments annually at the office within fifteen days after the day limited by the policy, upon pain of forfeiture of the benefit thereof, and no insurance is to take place until the premium be actually paid," and a loss happened within fifteen days after the end of one year, but before the premium for the next was paid, it was held that the insurers were not liable, although the insured tendered the premium within the fifteen days, but after the loss; that the insurance was for a year, and not a year and fifteen days, and the policy at an end by non-payment at the very day; and that, the receipt of the premium being in the discretion of the insurers, they had clearly a right to refuse to continue the policy. (p) Where there was a condition in a policy that the insured "should forfeit all benefit under his policy," if there was any false swearing in support of the claim he made, and the assured made an affidavit of damage

of a policy, authority to issue it will be presumed in absence of proof impeaching it. *American Ins. Co. v. Smith*, 73 Mo. 368.

The burden of proving a breach of the promissory warranty is upon the assured. *Wilson v. Hampden Fire Ins. Co.*, 4 R. I. 159. In an action by a mutual fire insurance company to recover the amount of an assessment on a premium note, the burden of proof is on the plaintiffs to show that such assessment was legally laid (*Augusta Mut. Fire Ins. Co. v. French*, 39 Me. 522; *Atlantic Mut. Fire Ins. Co. v. Fitzpatrick*, 2 Gray, 279); and in an action by a receiver upon a premium note, it is incumbent upon the plaintiff to give some evidence of the existence of losses which render an assessment proper (*Jackson v. Roberts*, 31 N. Y. 304).

As to waiver of forfeitures and estoppel against asserting them, see *Wood, F. Ins. c. 20 & 21*; *Bates, Dig. F. Ins.* 271, 700; *Clement, Supplement*, 92, 342, 393, 410; *Hine & Nichols, New Dig. Ins.* 678; *U. S. Dig. tit. Insurance*, sect. 400; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300.

(o) *Salvin v. James*, 6 East, 571.

Simpson v. Accid. Death Ins. Co., 2 C.

(p) *Ashurst, J., Tarleton v. Stan-*
forth, 5 T. R. 700; 1 B. & P. 471;

B. x. s. 298.

to the amount of £1081, and the claim was contested, and a jury gave a verdict for £500 only, the court granted a new trial. (q)

Divers Insurances on the Same Property.^{1 80} — If the insured has effected two or more insurances upon the same property, he can, as we have before seen, recover no more than his actual loss; and when he has obtained a full indemnity from the one, he cannot * resort to the other; but as he is allowed to [* 737] fix on which insurer he pleases, the law permits the one who has been compelled to make good the loss to resort to the others for contribution, and to recover from them a ratable proportion of the loss against which they have all insured. (r) If the insurer pays the money, and subsequently the insured receives compensation from any other sources for his loss, the insurer is entitled to recover from the insured any sum in excess of the loss. (s) There is no reason why the principle in respect of contribution should not be the same in respect of fire policies as they are in respect of marine policies, and if the *same person in respect of the same right* insures in two offices, there is no reason why they should not contribute in equal proportion in respect of a fire policy as they would in respect of a marine policy. (t)

Insurances by Warehousemen and Bailees of the Goods of their Customers.⁸¹ — A warehouseman, wharfinger, common carrier, or bailee of goods, may insure the goods which come to his hands from time to time, in the ordinary course of trade, and

¹ On this topic consult May, Ins. c. 16; Wood, F. Ins. c. 11; Bates, Dig. F. Ins. 415; Clement, Supplement, 217, 399; Hine & Nichols, New Dig. Ins. 360, 704; Sansum, Dig. Ins. sects. 450, 851; U. S. Dig. tit. *Insurance*, sects. 350, 1794, 1951; Wilson v. Queen Ins. Co., 5 Fed. Reporter, 674; Landers v. Watertown Fire Ins. Co., 86 N. Y. 414; article on When subsequent insurance avoids a policy, 15 Alb. L. J. 324; note on Liabilities of successive insurers, by A. C. Freeman, 28 Am. Dec. 121.

See further, as to reinsurance, May, Ins. 9; Bates, Dig. Ins. 569; Clement, Supplement, 277; Hine & Nichols, New Dig. Ins. 532; Sansum, Dig. Ins. 1180; U. S. Dig. tit. *Insurance*, 405.

(g) Levy v. Baillie, 7 Bing. 349. 560, C. A. See also Castellain v. Preston, 8 Q. B. D. 613.
(r) Davis v. Gildart, 2 Park, Ins. 601; Godin v. Lond. Ass. Co., 1 W. Bl. 103. (t) North British Ins. Co. v. London Ins. Co., 5 Ch. D. 569, C. A.

(s) Darrell v. Tibbetts, 5 Q. B. D.

^{80, 81} See Appendix, Vol. III.

may keep up a floating policy for the protection of the goods of his customers deposited in his warehouse, or upon his wharf, or in his boats, barges, or wagons. (*u*) It is not necessary that the bailee should have had any previous authority from the owners to insure in order to give him an insurable interest, (*x*) nor that he should have made any charge for insurance, nor that he should be in anywise liable to make good to his customers the loss that has been sustained, in order to entitle him to recover the full amount of the insurance from the insurers; (*y*) but he is not entitled, when he has received the money, to appropriate it to his own use. The money is the money of the owners of the goods, and may be recovered by them from the insurer who has received it. (*z*)

Inability of the Insured to sue when he has sustained no Damnification.—Policies against fire being contracts of indemnity, whatever undoes the damnification in the whole or in part must operate upon the indemnity in the same degree. If, therefore, the loss or damage insured against has been caused by the act or default of some wrong-doer, and the insurer [* 738] has brought an action * and recovered full compensation from such wrong-doer, he has then no ground to sue for an indemnity upon the contract of insurance; but if the compensation he receives falls short of the real injury, an action would be maintainable for so much as would suffice to constitute a complete indemnity.

Rights of Insurer and Insured as against Wrong-doers causing the Loss.⁸²—Every insurer has a right to be put in the place of the insured, and to use the name of the latter in order to recover compensation from a wrong-doer who has caused the loss. (*a*) If, therefore, the insurer has paid the amount of a loss caused by the wrongful act of a third party, he has a right to

(*u*) *Lond. & North-West. Ry. Co. v. Glyn*, 1 El. & El. 652; 28 L. J. Q. B. 188; *Crowley v. Cohen*, 3 B. & Ad. 478.

(*x*) *Hagedorn v. Oliverson*, 2 M. & S. 485.

(*y*) *Waters v. Mon. Life Co.*, 5 Ell. & Bl. 880; 25 L. J. Q. B. 102; *London & North-West. Ry. Co. v. Glyn*, 1 El. & El. 652; 28 L. J. Q. B. 188.

(*z*) *Randal v. Cockran*, 1 Ves. Sen. 97; *Yates v. Whyte*, 5 Sc. 640; *Sideways v. Todd*, 2 Stark. 400; *Lond. & North-West. Ry. Co. v. Glyn*, 1 El. & El. 652; 28 L. J. Q. B. 192.

(*a*) *Mason v. Sainsbury*, 3 Doug. 64; *Clark v. Blything*, 2 B. & C. 254; 3 D. & R. 489; see *Simpson v. Thompson*, 3 Ap. Cas. 279; *ante*, p. * 727.

sue the latter in the name of the insured to recover compensation for the injury; and if the insured receives from the insurer the amount insured, or full indemnity for his loss, and, after that, brings an action against, and obtains compensation from, a wrong-doer, he is not entitled to double satisfaction, and cannot put the money into his own pocket, but is a trustee thereof for the benefit of the insurer, and is bound to hand it over to the latter.

Assignment of Fire Policies.¹—A purchaser of property which is insured does not, by the mere fact of the purchase, and in the absence of any agreement to that effect, acquire any right to the insurance moneys. (b)⁸³

Laying out Insurance Money in Re-building.⁸⁴—By the 14 Geo. III. c. 78, sect. 83, the governors and directors of insurance offices are authorized, upon the request of any persons entitled to any house or other buildings which may be burnt down or damaged by fire, or upon any grounds of suspicion that the owners or occupiers, or other parties effecting the insurance, have been guilty of fraud or incendiarism, to cause the insurance money to be laid out in re-building. (c) Trade fixtures put up by a tenant, being removable by him, are not comprised in the expression "house or other buildings" in the statute. Therefore, where such fixtures are separately insured and destroyed by fire during the tenancy, the landlord is not entitled to have the insurance money laid out under the act; and a covenant by the tenant to deliver up the fixtures at the determination of the tenancy, as conferring a mere personal right resting in contract, makes no difference in this respect. (d) In order to entitle an owner to have the money laid out in re-building, he must make a distinct request to that effect to the insurance

¹ May, Ins. c. 17; Wood, F. Ins. c. 10; Bates, Dig. F. Ins. 128; Clement, Supplement, 43; Hine & Nichols, New Dig. Ins. 101; Sansum, Dig. Ins. sects. 155, 168; U. S. Dig. tit. Insurance, sect. 419. See also article on Rights of assignees under the policies, by C. M. Dunbar, 12 West. Jur. 707.

(b) *Poole v. Adams*, 33 L. J. Ch. 639. pard, 11 Q. B. 347; *Ex parte Goreley*,

(c) The operation of this section is 34 L. J. Bank. 1.
not limited to the metropolis, but is of (d) *Goreley, Ex parte*, 34 L. J. Bank. 1.
universal application. *Filliter v. Phip-*

83, 84 See Appendix, Vol. III.

[* 739] * office before they have settled with the tenant insuring; and in no case is the owner entitled himself to rebuild and claim the policy money. (e)

SECTION IV.

OF LIFE INSURANCE.

Of Contracts of Life Assurance.¹ — “The contract commonly called life insurance is a contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life, and, when once fixed, it is constant and invariable.” (a) This species of insurance is not, strictly speaking, a contract of indemnity; but it has so many features in common with those contracts, that it is convenient to consider it along with them.

Contracts with De Facto Directors. — A person who effects a policy with a life insurance company in the ordinary course of business is not bound to inquire whether the persons signing the policy as directors have been legally appointed directors, or are empowered to use the seal of the company. It is sufficient if the policy appears on the face of it to be consistent with the articles of association of the company, and the acts of parliament under which it is incorporated. (b)

¹ Bliss, L. Ins.; May, Ins.; U. S. Dig. tit. *Insurance*, IV.; Ann. Dig. tit. *Insurance*; articles on the Civil war and life insurance, 11 Am. L. Rev. 221; 3 South. L. Rev. n. s. 387; 16 Am. L. Reg. n. s. 651. Since 1871, the various decisions on life insurance have been conveniently republished in the *Insurance Law Journal*.

Law of place as to life policies. *Northwestern Mut. Life Ins. Co. v. Elliott*, 5 Fed. Reporter, 225; *Smith v. Mutual Life Ins. Co.*, ib. 582.

Limitations in life policies upon time of suing. *O’Laughlin v. Union Central Life Ins. Co.*, 11 Fed. Reporter, 280.

(e) *Simpson v. The Scottish Union Insurance Co.*, 1 H. & M. 618; 32 L. J. Ch. 329.

(a) *Parke, B., Dalby v. Ind. & Lond. Ass. Co.*, 15 C. B. 387; 24 L. J. C. P. 6.

(b) *County Life Assurance Co., In re*, L. R. 5 Ch. 288.

Of the Interest of the Insured.¹—By the 14 Geo. III. c. 48, it is enacted (sect. 1) that no insurance shall be made on the life of any person wherein the person for whose use or benefit, or on whose account, the policy shall be made, shall have no interest, by way of gaming or wagering (*ante*, pp. * 677, * 678); that it shall not be lawful to make any policy on life or lives without inserting therein the name of the person interested therein, or for whose use and benefit, and on whose account, the policy was made; (c) and (sect. 3) that in all cases where the insured has an interest in such life or lives, no greater sum shall be recovered and received from the insurer than the amount or value of the interest of the insured in such life or lives; but nothing therein contained is (sect. 4) to extend to * insurances on [* 740] ships, goods, or merchandises. If an insurance company lends money at interest upon the terms that the borrower do insure his life in double the money lent, the policy executed in furtherance of this agreement is not a gaming or wagering policy within the meaning of the statute. (d)⁸⁵ The interest of the insured must be a pecuniary interest in the duration of the life insured; (e) such as the interest which a creditor has in the life of his debtor, (f) or a trustee in his trust moneys and revenues, (g) or a wife in the life of her husband who is bound by law to support and maintain her, (h) or the interest which a husband has in an annuity payable to his wife for life. (i) By the Married Women's Property Act, 1870, (k) a married woman may effect a policy upon her own life or the life of her husband for her separate use; and a policy effected by the husband on his own life for the benefit of his wife or children will

¹ As to insurable interest in the contract of life insurance, see Bliss, *L. Ins.* (2d ed. 1874) c. 2; May, *Ins. c. 4*; Sansum, *Dig. Ins.* 683; Sharpstein, *Dig. Ins.* 138; U. S. Dig. tit. *Insurance*, sect. 1953.

(c) <i>Hodson v. Observ. Life Ass. Co.</i> , 8 Ell. & Bl. 40; 26 L. J. Q. B. 303; <i>Shilling v. Accid. Death Ins. Co.</i> , 2 H. & N. 42; 27 L. J. Ex. 16.	(f) <i>Anderson v. Edie</i> , 2 Park, <i>Ins.</i> 914.
(d) <i>Downes v. Green</i> , 12 M. & W. 490.	(g) <i>Tidswell v. Ankerstein, Peake</i> , 204.
(e) <i>Halford v. Kymer</i> , 10 B. & C. 724.	(h) <i>Reed v. R. Ex. Ass. Co.</i> , 2 Peake, 70.
	(i) <i>Henson v. Blackwell</i> , 4 Hare, 434.
	(k) 33 & 34 Vict. c. 93, sect. 10.

⁸⁵ See Appendix, Vol. III.

inure for the benefit of his wife for her separate use and of her children, and does not form part of his estate or that of his creditors. (l) Where a creditor promised his debtor that he would not exact payment of the debt during his life, but there was no consideration or other circumstances to make the promise binding, the court held that the promise did not give the debtor an insurable interest in the life of the creditor. (m) But a contract for employment at a fixed salary for a certain term gives the employed an insurable interest in the life of the employer. (n) If one person has a present interest in the policy, though, after that present purpose is satisfied, another person may be the party interested, the name of both persons must be inserted in the policy. (o) If the insured has an insurable interest in the duration of the life at the time he effects the policy, and his interest afterward ceases, he is not thereby prevented from suing upon the policy to recover so much of the sum insured as his interest in the life extended to at the time of the making of the policy. If, therefore, a creditor insures the life of his debtor for a certain sum, and the debt is paid, the creditor is not thereby deprived of his right of action upon the policy. (p) But though upon a life policy the insurable interest at the time of the making of the policy, and not the interest at the time of the death, is to be considered, the insured cannot recover from the insurers, [* 741] whether upon one policy or many, more * than the insurable interest which the person making the insurance had at the time he insured the life. If for greater security he thinks fit to insure with many persons, and by different contracts of insurance, and to pay the premiums upon each policy, he is at liberty to do so; but he can only recover or receive upon the whole the amount of his insurable interest. If, therefore, he has received the whole amount from one insurer, he is precluded from recovering any more from the others. (q) If the under-

(l) See *Holt v. Everall*, 2 Ch. D. 266; *In re Mellor's Policy Trusts*, 6 Ch. D. 127; 7 Ch. D. 200.

(m) *Hebden v. West*, 3 B. & S. 579; 32 L. J. Q. B. 85.

(n) *Hebden v. West*, *supra*.

(o) *Evans v. Bignold*, L. R. 4 Q. B. 622.

(p) *Dalby v. Ind. & Lond. Life Ass. Co.*, 24 L. J. C. P. 3; 15 C. B. 365, overruling *Godsall v. Boldero*; *Law v. Lond. Indisp.*, 24 L. J. Ch. 196.

(q) *Hebden v. West*, *supra*.

writer becomes bankrupt before the death has taken place and the amount insured has become payable, the interest of the insured in the policy may be valued and proved under the bankruptcy against such bankrupt underwriter. (r)

Warranties — Conditions.⁸⁶ — A statement respecting the life insured does not amount to a warranty unless it is made the basis of the contract, and was intended by the parties to have that effect; (s)¹ but policies are generally granted subject to the condition that, if any untrue statement is contained in any of the documents addressed to the insurers in relation to the life insured, the policy shall be void. (t) By untrue statement is sometimes meant a statement that is wilfully and designedly untrue. (u) In other cases the policy will be void if the statement is unintentionally untrue, (x) and is material. (y) When there is a warranty that the person whose life is to be insured is in good health, it means that he is in a reasonably good state of health, not that he is perfectly free from illness. If there is a warranty that the party is "free from any disorder tending to shorten life," it does not mean that he has no disease at all; and it is not to be concluded that a disorder with which a person is afflicted at the time the insurance is effected is a disorder tending to shorten life, merely because he afterward dies of it. (z) A warranty that the party whose life is insured "has not been afflicted with, nor is subject to, vertigo, fits, &c.," does not mean that the party has never had a fit in his life, but that he is not at the time the insurance is made, a person habitually

¹ Upon the subject of warranties, representations, conditions, and concealments, consult Bliss, L. Ins. c. 3, 4; May, Ins. c. 6-9; Sansum, Dig. Ins. sect. 1294; Sharpstein, Dig. Ins. 86, 233; U. S. Dig. tit. *Insurance*, sects. 1979-1999; see also *Æna Life Ins. Co. v. Paul*, 10 Ill. App. 431.

(r) *Cox v. Liotard*, 1 Doug. 166, n. Promoter Life Ass. Co., 14 Ir. C. L. R. 487.
 (s) *Wheelton v. Hardisty*, 8 Ell. & Bl. 302; 26 L. J. Q. B. 265; 27 ib. 241. (x) *Macdonald v. Law Union Ins. Co.*, L. R. 9 Q. B. 328.
 (t) *Cazenove v. Brit. Eq. Ass. Co.*, 28 L. J. C. P. 259; 29 ib. 160. (y) *London Ass. Co. v. Mansel*, 11 Ch. D. 363.
 (u) *Fowkes v. Manch., &c. Ins. A.*, 3 B. & S. 917; 32 L. J. Q. B. 153; *Perkins v. Marine & Gen. Ins. Co.*, 2 Ell. & Ell. 317; 27 L. J. Q. B. 242; *Sweeney v. Aveson v. Ld. Kinnaird*, 6 East, 188.

⁸⁶ See Appendix, Vol. III.

or constitutionally afflicted with fits. (a) If the insured, or his broker, or the agent effecting the policy, merely says that he believes the life to be a good one, but will not warrant, [* 742] the * underwriter will be liable, unless he can show that the party so stating his belief knew that the life was not good. (b)

Fraudulent Misrepresentation and Fraudulent Concealment¹ of circumstances material to be known to the underwriter naturally avoid life policies in common with all other contracts, the materiality of the misstatement or concealment being a question for the jury. (c)⁸⁷ Some policies, however, make the insurance company itself sole judge of the materiality or immateriality of the falsehood, and adopt the most stringent provisions against misstatement, whether material or immaterial, known or not known to be untrue by the party making them, so that, observes Lord St. Leonards in a recent case, "I am bound to say, unless they are fully explained to the parties, a vast number of persons will be led to suppose that they have made a provision for their families by an insurance on their lives, when, in point of fact, the policy is not worth the paper on which it is written." (d) False answers given to verbal inquiries as to whether the life sought to be insured had been previously insured at other offices

¹ See, as to false representation, generally, *Schultz v. Mut. Life Ins. Co.*, 6 Fed. Reporter, 672; *Fletcher v. New York Life Ins. Co.*, 11 Fed. Reporter, 377; *Lueders v. Hartford Life, &c. Ins. Co.*, 12 ib. 465.

That a promissory misrepresentation does not avoid a life policy, see *Hale v. Continental Life Ins. Co.*, 12 Fed. Reporter, 359.

The burden is upon the insurers to show that the representations of the insured, when he applied for a policy, were untrue (*Campbell v. New England, &c. Ins. Co.*, 98 Mass. 381); as where he may have represented his habits falsely (*New York Life Ins. Co. v. Graham*, 2 Duv. 506); it is also upon the insurers to show that a party insured is still living after he has not been heard from for seven years, the law presuming him dead upon the expiration of that time (*Angell, Ins. sect. 351*); but where the insurers resist the payment of a loss upon a life policy, the burden of proof rests with the party claiming an interest (*Mutual Life Ins. Co. v. Wager*, 27 Barb. 354).

(a) *Chattock v. Shawe*, 1 Mood. & C. 586; *Jones v. Provinc. Ins. Co.*, 3 C. B. n. s. 86.

(b) *Stackpole v. Simon*, 2 Park, Ins. 932. (d) *Anderson v. Fitzgerald*, 4 H. L. C. 507; *Towle v. The National Guardian Ass. Soc.*, 3 Giff. 42; 30 L. J. Ch. 900.

(c) *Lindenau v. Desborough*, 8 B. & C. 900.

have been held to be fraudulent misrepresentations avoiding the policy; (e) and so have false answers respecting spitting of blood, consumptive symptoms, &c., or concerning the general health and state and condition of the life insured. (f) If the insurer is referred for information to a former medical attendant of the life insured, and not to the immediate and usual medical attendant, such an omission to refer to the proper person will vacate the policy.

Principal and Agent.¹— If an untrue statement or a concealment of a fact or non-communication of a material circumstance takes place through the instrumentality of an agent, the insured, who is to benefit by the policy, is bound by it, though he himself is not privy to the falsehood of the representation or the non-communication of the material fact. But where a party effects a policy on the life of another, the person whose life is insured is not the general agent of the person procuring the insurance, so as to make his false representations the false representations of the party procuring the insurance; and the same may be said of false representations of medical attendants and referees, unless these representations are expressly made the basis of the policy, or the parties making them are themselves the persons negotiating the contract. There is no analogy between the statements “of the * life” or the [* 743] referees in the negotiation of a life insurance and the statements of an insurance broker to underwriters, by which he induces them to subscribe the policy. (g)⁸⁸ But policies may be framed making the insured responsible for any material misrepresentation or concealment by the “life” or the referees.

Indisputable Policies.⁸⁹— Many insurance companies issue prospectuses and transact their business on the terms that all poli-

¹ Upon the subject of insurance agents, their powers and duties, consult Bliss, L. Ins. c. 9; May, Ins. c. 5; Sansum, Dig. Ins. sect. 1065; Sharpstein, Dig. Ins. 47; U. S. Dig. tit. *Principal and Agent*; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300; *Marvin v. Universal Life Ins. Co.*, 85 N. Y. 278; *Mohr, &c. Distilling Co. v. Ohio Ins. Co.*, 13 Fed. Reporter, 74.

(e) *Wainwright v. Bland*, 1 M. & W. 32. (g) *Wheelton v. Hardisty*, 8 Ell. & Bl. 232, 285; 27 L. J. Q. B. 241.

(f) *Geach v. Ingall*, 14 M. & W. 95.

^{88, 89} See Appendix, Vol. III.

cies effected by them shall be unquestionable or indisputable, unless obtained by fraud. (*h*)

Of the Risks covered by the Policies.¹ — "When a man makes insurance upon a life generally, without any representation of the state of the life insured, the insurer takes all the risks, unless there was some fraud in the person insuring, either by his suppressing circumstances which he knew, or alleging what was false." (*i*) Where, therefore, there is no express provision in the policy that in the event of the insured dying by his own hand the policy shall become void, the policy is not vacated by the circumstance of his having died by his own hand while in a state of temporary insanity. (*k*) But if a man insures his own life for a certain sum to be paid to his executors after his decease, in consideration of annual premiums to be paid by him to an insurance company, the policy will be void, and the amount irrecoverable, if he is killed in a duel, or feloniously destroys himself, or dies by the hand of the common hangman or public executioner. (*l*) In most policies, where parties insure their own lives, a condition is inserted making void the policy in case the party shall die by his own hands, or by the hands of justice, or in consequence of a duel; and it has been held that such a condition is not limited to felonious self-destruction, but extends to all cases of voluntary self-destruction, so that if a man destroys himself in a fit of frenzy or delirium, the insurers will be discharged from liability. (*m*) Such policies sometimes contain an

¹ As to the risks covered by a policy of life insurance, including cases of suicide, see Bliss, L. Ins. c. 5, 6; May, Ins. c. 12, 13, 14, 18; Sharpstein, Dig. Ins. 193, 195; Sansum, Dig. Ins. sect. 1355; U. S. Dig. tit. *Insurance*, sect. 2016.

Suicide, dying by one's own hand, &c., *Lawrence v. Mutual Life Ins. Co.*, 5 Ill. App. 280; *Murray v. New York Life Ins. Co.*, 19 Hun, 350; *Hill v. Hartford Accident Ins. Co.*, 22 Hun, 187, 11 Week. Dig. 111; *Adkins v. Columbia Life Ins. Co.*, 70 Mo. 27; *Sheffer v. National Life Ins. Co.*, 25 Minn. 334; *Knecht v. Mutual Life Ins. Co.*, 90 Pa. St. 118; *Wheeler v. Connecticut Mut. Life Ins. Co.*, 23 Alb. L. J. 267, 10 Ins. L. J. 116; *Waters v. Connecticut Mut. Life Ins. Co.*, 2 Fed. Reporter, 892; *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 317.

(*h*) *Wood v. Dwaris*, 11 Exch. 493; (*k*) *Horn v. Anglo-Austra. Ass. Co.*, *Wheulton v. Hardisty*, 8 Ell. & Bl. 30 L. J. Ch. 511.

264. (*l*) *Amicable Society v. Bolland*, 4

(*i*) *Ross v. Bradshaw*, 2 Park, Ins. Bligh, n. s. 194.

934. (*m*) *Clift v. Schwabe*, 3 C. B. 476; 17 L. J. C. P. 2; *Dormay v. Borradaile*,

exception to the effect that the policy in such a case shall not be void to the extent of any *bona fide* interest therein which at the time of such death shall be vested in any other person for a sufficient pecuniary or other consideration; and where the insurance company with whom the policy was effected had advanced money to the insured upon mortgage and upon the deposit of the policy as a collateral security, it was held that they * had such a *bona fide* interest, and that the [* 744] policy was not void upon the suicide of the insured. (n)

If the life is insured for one year from the day of the date of the policy, and the death occurs that very day twelvemonth, the insurer will be liable; for "from the day of the date excludes the day." (o) But the word "from" may mean either inclusive or exclusive, according to the apparent intention of the parties, to be gathered from the general context of the written instrument. (p)

Forfeiture of Policies¹—Non-Payment of Premium—Days of Grace.⁹⁰—Whenever the policy is to become forfeited if the premium is not paid by a given day, but the policy may nevertheless be revived on payment of the premium within a certain extended period of time, it has been held to be essential to the revival of the policy that the life insured is in being at the time of the payment and acceptance of the premium. (q) Where the policy was to continue, provided *the insured* paid the premium within twenty-one days after it became due, and the premium became due and was not paid, and the insured died within the twenty-one days, it was held that the premium could not be paid and the policy kept on foot by his executors. (r)

¹ As to the payment and non-payment of premiums, consult Bliss, L. Ins. 272-320; May, Ins. c. 15; U. S. Dig. tit. *Insurance*, sect. 2000; Sansum, Dig. Ins. sect. 900; Sharpstein, Dig. Ins. 165; *Palmer v. Phoenix Mutual Life Ins. Co.*, 84 N. Y. 63; *Seamans v. Northwestern Mut. Life Ins. Co.*, 3 Fed. Reporter, 325; *Selvage v. Hancock Mut. Life Ins. Co.*, 12 ib. 603; *Pendleton v. Knickerbocker Life Ins. Co.*, 7 Fed. Reporter, 169.

16 ib. C. P. 337; 5 C. B. 380; *Moore v. Pugh v. Duke of Leeds*, 2 Cowp. Woolsey, 24 L. J. Q. B. 40; *Dufaur v.* 714.

Profess. Life Co., 27 L. J. Ch. 817. (q) *Pritchard v. Merch. Life Ass. Co.*,

(n) *White v. The British Empire* 3 C. B. n. s. 642; 27 L. J. C. P. 169.

Mutual Life Ass. Co., L. R. 7 Eq. 394. (r) *Simpson v. Accid. Death Ins.*

(o) *Howard's Case*, 2 Salk. 625. Co., 2 C. B. n. s. 295; *Want v. Blunt*, 12

⁹⁰ See Appendix, Vol. III.

Many policies, however, expressly provide that in case any person on whose life any insurance shall have been effected shall happen to die after the premium has become due, but before payment, the insurance shall nevertheless be valid, provided the premium is paid within the days of grace. (*s*) The debiting by the insurer of the agent of the insured with the premium is not a payment to the insurer by the insured. (*t*) A claim under a winding-up in respect of a policy of life insurance is not affected by non-payment of the premium where the days of grace have not expired until after the commencement of the winding-up. (*u*)

Non-Inception of the Risk — Return of Premium.⁹¹ — When the policy is rendered null and void by reason of a misstatement made by the insured by mistake, and without fraud, and the risk has never attached, the premium is, as we have already seen in the case of marine insurance (*ante*, p. *728), recoverable; but if the policy is avoided by reason of the fraud or deceit of the insured or his agent, the premiums cannot then be recovered

back. (*x*) The policies of most insurance companies [* 745] now provide not only that * the contract shall be void

if there is any false statement or misrepresentation on the part of the insurer of any material circumstance, but that all the premiums that may have been paid upon the policy shall be forfeited to the insured, so that the policy may be avoided, and the premiums forfeited, by an innocent and unintentional misstatement. (*y*) But Lord St. Leonards draws a distinction between that portion of the proviso which is framed as a protection to the insurer by making his liability for the payment of the amount insured dependent upon a true and accurate statement of every material circumstance, and the penal part of the proviso working a forfeiture of the premiums, and intimates that such a construction should be adopted as will afford a fair security to the insurer from misrepresentation and misstatement, on the one hand, and a just protection to the

East, 183; *Tarleton v. Staniforth*, 5 T. R. 695.

(*u*) *In re Albert Ass. Co.*, Cook's Policy, L. R. 9 Eq. 703.

(*s*) *Prince of Wales Life Ass. Co. v. Harding*, 27 L. J. Q. B. 301; El. Bl. & El. 183.

(*x*) *Duffell v. Wilson*, 1 Campb. 401.

(*y*) *Duckett v. Williams*, 2 C. R. & M. 348.

(*t*) *Accey v. Fernie*, 7 M. & W. 151.

insured against the forfeiture, on the other, where there has been no wilful misstatement or misconduct on his part. (z)

Waiver of Forfeiture.⁹²—If after the policy has been forfeited by non-observance of a condition annexed to it, the insurers or their agent continue to receive the premiums with full knowledge of the breach of the condition, they will be deemed to have waived the forfeiture, and will not afterward be permitted to avoid the policy. (a)¹

Assignment of Life Policies.⁹³—Policies of life insurance, being *choses in action*, could not formerly be assigned, so as to give the assignee a right to maintain an action upon them in his own name. But the assignment vested the equitable interest in the contract in the assignee, and entitled the latter to sue upon the policy in the name of the party who was clothed with the legal interest, and who had the right of action thereon at common law. (b)²

Now, however, by the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), any person or corporation now being or hereafter becoming entitled, by assignment or other derivative title, to a policy of life assurance, and possessing at the time of action brought, the right in equity to receive and give an effectual discharge for the moneys thereby assured, may sue at law in the name of such person or corporation to recover such moneys. By sect. 3, no assignment made after the passing of the act is to confer on the assignee any right to sue, until a written notice of the date and purport of the assignment has been given to the assurance company * at their principal place of [* 746] business, which is to be specified in the policy (sect. 4);

¹ May, Ins. c. 22; Bliss, L. Ins. c. 8; Sansum, Dig. Ins. sects. 454, 1489; Sharpstein, Dig. Ins. 120, 225, 110; Klein v. Insurance Co., 104 U. S. 88; Thompson v. Insurance Co., ib. 252.

² May, Ins. c. 17; Bliss, L. Ins. c. 10; Sansum, Dig. Ins. sect. 168; Sharpstein, Dig. Ins. 57; U. S. Dig. tit. *Insurance*, sect. 419; Warnock v. Davis, 104 U. S. 775; article on Assignments of life-policies, 18 Alb. L. J. 44.

(z) Anderson v. Fitzgerald, 4 H. L. 511; Armstrong v. Turquand, 9 Ir. C. 484; Jones v. Provinc. Ins. Co., 3 Com. Law Rep. 32.

C. B. N. s. 65; 26 L. J. C. P. 272; Caz- (b) Ashley v. Ashley, 3 Sim. 151.
enove v. Brit. Eq., 5 Jur. N. s. 1309; 29 See now, as to assignment of a *chosc*
L. J. C. P. 160. in action, Jud. Act, 1873, sect. 25 (b),

(a) Wing v. Harvey, 23 L. J. Ch. post, Transfer.

^{92, 93} See Appendix, Vol. III.

and the date on which the notice is received is to regulate the priority of all claims under any assignment; and a payment *bona fide* made in respect of any policy by any assurance company before the date on which the notice is received, is to be as valid as if the act had not been passed. By sect. 5, the assignment may be made either by indorsement on the policy or by a separate instrument in the form given in the act. By sect. 6, every assurance company to whom notice of assignment shall have been given are, at the request in writing of the person giving the notice, and upon payment of a fee not exceeding five shillings, to deliver an acknowledgment in writing under the hand of the manager, secretary, treasurer, or other principal officer of the assurance company of their receipt of such notice; and such acknowledgment, if signed by a person being *de jure* or *de facto* the manager, secretary, treasurer, or other principal officer of the assurance company, will be conclusive evidence as against the company of their having duly received the notice to which the acknowledgment relates. By sect. 7, the expression "policy of life assurance" or "policy" is to mean an instrument by which the payment of moneys, by or out of the funds of an assurance company, on the happening of any contingency depending on the duration of human life, is assured or secured; and the expression "assurance company" is to mean and include every corporation, association, society, or company carrying on the business of assuring lives or survivorships, either alone or in conjunction with any other object. By sect. 8, the act is not to apply to any policy of assurance granted or to be granted, or to any contract for a payment on death entered into, in pursuance of the provisions of the 16 & 17 Vict. c. 45, or the 27 & 28 Vict. c. 43, or to any engagement for payment on death by any friendly society.

Notice of the assignment should be given to the insurance company, for the purpose of securing a right to sue in the name of the assignee. (c) An assignment of a life policy to secure a debt, with proviso for redemption, is an assignment

(c) *Post*, p. *1271; *Williams v. & Bl.* 67; *Thompson v. Tomkins*, 2 Thorp, 2 Sim. 257; *Ex parte Colvill*, 1 Drew. & Sm. 8; *Webb, In re*, 36 L. J. Mont. 110; *Ex parte Tennyson*, 1 Mont. Ch. 341.

by way of mortgage, and requires an *ad valorem* stamp as such. (d)

Where a policy is to be void in case of suicide, unless it has been legally assigned, any circumstances constituting a valid equitable assignment of the policy will satisfy the proviso; (e) but an assignment by operation of law, such as an assignment by force * of the bankrupt acts, is not [* 747] within the proviso, and will not keep the policy on foot for the benefit of creditors. (f)

Right of the Party interested in the Policy to recover the Insurance Money.⁹⁴—The liability upon a life policy is not affected by the question whether the party claiming the benefit of the policy has, or has not, been damnified by the happening of the contingency upon which the money becomes payable. Thus if a creditor insures the life of his debtor to the extent of the debt, and after the death of the debtor the executors of the debtor pay the debt to the creditor, the latter may nevertheless recover upon the policy the amount insured by him upon the life of such debtor. (g)

Appropriation of the Funds of Life Insurance Companies.—By the 33 & 34 Vict. c. 61, sect. 4, it is enacted that, “in the case of a company established after the passing of this act, transacting other business besides that of life assurance, a separate account shall be kept of all receipts in respect of the life assurance and annuity contracts of the company, and the said receipts shall be carried to and form a separate fund, to be called the life assurance fund of the company, and such fund shall be as absolutely the security of the life policy and annuity holders as though it belonged to a company carrying on no other business than that of life assurance, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of life assur-

(d) *Caldwell v. Dawson*, 5 Exch. 6.

(g) *Dalby v. Ind. & Lond. Life Ass.*

(e) *Jones v. Consol. Ins. Co.*, 28 L. J. Ch. 66; 26 Beav. 256; *White v. The British Ass. Co.*, ante, p. * 744.

Co., 15 C. B. 390; 24 L. J. C. P. 8, overruling *Godsall v. Boldero*, 9 East, 72; *De Morgan on Probabilities*, p. 244,

(f) *Jackson v. Forster*, 1 Ell. & Ell. 463; 29 L. J. Q. B. 8; *Moore v. Woolsey*, 4 Ell. & Bl. 255; 24 L. J. Q. B. 40.

cited ib. 393-397; *Law v. Lond. Indisp. Ass. Co.*, 24 L. J. Ch. 196; ante, p. * 740.

⁹⁴ See Appendix, Vol. III.

ance; (h) and in respect to all existing companies, the exemption of the life assurance fund from liability for other obligations than to its life policy-holders shall have reference only to the contracts entered into after the passing of this act, unless by the constitution of the company such exemption already exists; provided always that this section shall not apply to any contracts made by any existing company by the terms of whose deed of settlement the whole of the profits of all the business are paid exclusively to the life policy-holders, and on the face of which contracts the liability of the assured distinctly appears."

Winding-Up of Insurance Companies. — By sect. 21, "the court may order the winding-up of any company in accordance with the Companies Act, 1862, on the application of [* 748] one or more *policy-holders or shareholders, upon its being proved to the satisfaction of the court that the company is insolvent." (i)

By sect. 22, "the court, in the case of a company which has been proved to be insolvent, may, if it thinks fit, reduce the amount of the contracts of the company upon such terms and subject to such conditions as the court thinks just, in place of making a winding-up order." (ii)

Under the articles of association of an insurance company it was held that the policy-holders who participated in the profits to some degree were members and liable to be put on the list of contributories upon the winding-up of the company, (k) but that they were not to be called on to contribute until the shareholders were exhausted. (l) The court has jurisdiction to wind up an unregistered mutual insurance society; but it seems that the holders of policies in such a society are not liable to contribute

(h) By the 35 & 36 Vict. c. 41, sect. 2, the foregoing part of the section is to apply to every company established before the passing of the 33 & 34 Vict. c. 61; but neither this nor that act is to diminish the liability of the life assurance fund for any contracts entered into before the passing of the 33 & 34 Vict. c. 61.

(i) And see the 35 & 36 Vict. c. 41, sect. 4, as to the winding-up of a subsidiary company. The mode of valuing

the policies in the case of a winding-up is provided for by sect. 5 of the same act.

(ii) See *In re Gt. Britain Ass. Soc.*, 20 Ch. D. 351.

(k) *Winstone's case*, 12 Ch. D. 239; but not a policy-holder who has assigned his policy: *Brown's case*, 18 Ch. D. 639. As to the liability of the assignee, see *Sanders's case*, 20 Ch. D. 403.

(l) *In re Albion Life Ass. Soc.*, 16 Ch. D. 83.

to the payment of debts, and the funds of the society are distributable among them in proportion to their claims. (*m*)

Novations by Policy-Holders.—By the 35 & 36 Vict. c. 41, sect. 7, it is provided that “where a company, either before or after the passing of this act, has transferred its business to or been amalgamated with another company, no policy-holder in the first-mentioned company who shall pay to the other company the premiums accruing due in respect of his policy shall by reason of any such payment made after the passing of this act, or by reason of any other act done after the passing of this act, be deemed to have abandoned any claim which he would have had against the first-mentioned company on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorized.”

Insurance against Injury by Accident.⁹⁵—Where an insurance company granted policies of insurance against loss of life and personal injuries arising from “accidents at sea,” it was held that death by sunstroke was not an “accident” within the meaning of the policy, and that death engendered by exposure to heat, cold, damp, and atmospheric influences could not properly be said to be accidental; (*n*)¹ but death by drowning is a case of death by “accident” within the meaning of [* 749] such a policy. (*o*) Where a policy for insuring the payment of money in case the insured should be injured by accidental violence, and die from the direct effect of such accidental injury, expressly excepts death or disability from any disease or cause arising within the system of the insured before, or at the time of, or following such accidental injury, death from disease

¹ Bliss, L. Ins. c. 14; May, Ins. c. 23; Sansum, Dig. Ins. sect. 40; Sharpstein, Dig. Ins. 34; U. S. Dig. tit. *Insurance*, sect. 2020; article on the Proximate cause of death in accident insurance policies, by H. W. Monckton, 16 Am. Law Rev. 527.

(*m*) *In re Great Britain Ass. Soc.*, 16 Ch. D. 246. & N. 839; 30 L. J. Ex. 317; *Winspear v. Accident Ins. Co.*, 6 Q. B. D. 42;

(*n*) *Sinclair v. Maritime Pass. Ass. Co.*, 30 L. J. Q. B. 77. *Lawrence v. Accident Ins. Co.*, 7 Q. B. D. 216.

(*o*) *Trew v. Rail. Pass. Ass. Co.*, 6 H.

⁹⁵ See Appendix, Vol. III.

within the system, which disease has been caused by accidental violence, is not within the exception. (*p*) In consequence of the above case, the clause contained in the policies of the company was varied, and the policy does not now insure against "death from rheumatism, gout, hernia, erysipelas, or any other disease or secondary cause or causes arising within the system of the insured before, or at the time of, or following such accidental injury (whether causing such death directly or jointly with such accidental injury)." Where erysipelas supervened upon, and in consequence of, an accidental cut, and the assured died of the erysipelas seven days after the accident, it was held that the insurers were protected by the above condition, and were not liable. (*q*)

Railway Accidents — Damages.⁹⁶ — Where a passenger by railway effected an insurance for £1000 with a company, to be paid to his personal representatives in the event of his death by a railway accident, and a proportionate part of the £1000 to be paid to the insured himself in case of any personal injury by reason of such accident, it was held that the damages recoverable in respect of personal injury to the insured, not attended with loss of life, were confined to compensation for bodily pain and suffering and the expenses of medical and surgical attendance, &c., and that loss of time or loss of profits resulting from the accident could not be taken into consideration by the jury; "otherwise one passenger, whose time is more valuable than another's, would, for precisely the same personal injury, receive a larger remuneration than another whose time would be of less value." (*r*)

Breach of Covenants to Insure. — Where a covenant was entered into with an insurance company to keep up a policy in their office as security for money lent by them, and the policy was dropped, and the company recovered judgment for the amount of the loan, with interest thereon, it was held that the measure of damages was not the amount of the premiums which

(*p*) *Fitton v. Accidental Death Ins. Co.*, 17 C. B. N. S. 122; 34 L. J. C. P. L. R. 5 Ex. 302.
29.

(*q*) *Smith v. The Accident Ins. Co.*, L. R. 5 Ex. 302.
(*r*) *Theobald v. Railway Passengers' Ass. Co.*, 23 L. J. Ex. 249.

would have been payable to the company if the policy had been kept up, but the * amount of injury sustained, [* 750] either through loss of the security, or through the expenses incurred in effecting another insurance. (s) Where a deed by which a debtor assigned a policy of insurance on his life for £1000 to trustees for his creditors, contained a covenant that he would not do any act or thing by which the policy should be forfeited, and the policy was subject to a condition that, if the insured should go beyond the limits of Europe without license from the directors, the policy should be void, and the debtor went beyond the limits of Europe without license from the directors, it was held that the measure of damages was the present value of the policy to be assessed by an actuary, taking into consideration the fact that the debtor had covenanted to pay, and would have to pay, the premiums on the policy. (t)

(s) *Nat. Ass. Co. v. Best*, 27 L. J. Ex. 19; *Brown v. Price*, 4 C. B. N. S. 343; 33 L. J. Q. B. 192. 598.

(t) *Hawkins v. Coulthurst*, 5 B. & S.

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*CHAPTER V.

MERCANTILE INSTRUMENTS.

SECTION I.

BILLS, NOTES, AND CHEQUES.

Negotiable Instruments.¹—When an instrument is by the custom of trade transferable, like cash, by delivery, and is also

¹ Several standard American text-books devoted to the subjects embraced within this section — Parsons on Notes and Bills (7th ed., 1878), Story on Promissory Notes (7th ed., 1878), and Story on Bills of Exchange (4th ed., 1860) — have been, with the exception of the one last named, brought down to comparatively late dates by recent editions; later yet is Daniel, *Negotiable Instruments* (3d ed., 1882).

The number of reported decisions on these topics has become so great as to call for books which collect the leading cases, and group under them the mass of less important adjudications. Of this character are two recent works, one by M. M. Bigelow, in a single volume, *Bills and Notes* (2d ed., 1880), and the other, in two volumes, by Prof. J. B. Ames. Ames's *Bills and Notes* (1881) affords a full view, and its analysis appears to be very complete and satisfactory. The first chapter, upon Formal Requisites, is divided into the following sections: 1. A bill must contain an order. 2. A note must contain a promise. 3. The order or promise must be unconditional. 4. They must be for the payment of money. 5. The order or promise to pay money must not be coupled with an independent order or promise to do something else. 6. The payment must be certain, (a) in amount; (b) in time. 7. A bill or note must be certain in respect to parties, (a) Drawer; (b) Drawee; (c) Payee. 8. A bill or note is complete only upon delivery. 9. Ambiguous instruments. The next three chapters treat similarly of Acceptance, Indorsement, and Transfer. In the second volume special mention is due of the discussions of the obligations of drawer and indorser, of diligence, and of the fact that a bill or note is in the nature of a specialty. After chapters on Cheques and on Negotiable Paper other than bills, notes, and cheques, there follows in conclusion an Index and Summary, covering almost one hundred pages, and constituting a good key to one of the most valuable text-books on this branch.

Regarding the form of bills and notes, and what features are necessary in order that they shall be negotiable, see 1 Ames, *Bills & N. c.* 4, sect. 1; 2 ib. 879, tit. *Transfer*, 1-5; Bigelow, *Bills & N. c.* 1; Daniel, *Negot. Instr.* sects. 1, 104, 107; 1 Pars. *Notes & B. c.* 3, 4; 2 ib. c. 1; Story, *Prom. N. c.* 1; U. S. Dig. tit. *Bills and Notes*, I, V.; also Ann. Dig. 1870-1872, tit. *Bills of Exchange*; Ann. Dig. 1872,

capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a *negotiable instrument*, and the property in it passes to a *bona fide* transferee for value, though the transfer may not have taken place in market overt. But if either of the above requisites is wanting, that is, if it is either not accustomably transferable, or though it be accustomably transferable, yet if its nature is such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a negotiable instrument, nor will delivery of it pass the property in it to a vendee, however *bona fide*, if the transferor himself has not a good title to it, and the transfer is made out of market overt. (a) Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract; and if he is a *bona fide* holder for value, he has a good title, notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it.

Bills of Exchange.⁹⁷—Any absolute, unconditional order (b) in *writing from one man to another, duly [* 752] stamped, directing the drawee, or person to whom the order is addressed, to pay a sum of money to the drawer or to his "order," or to some third party, or to the order of such third party, is a bill of exchange transferable by the payee, so as to

&c., tit. *Bills and Notes*; article on Uncertainty of Amount in Instruments otherwise Negotiable, by E. G. Merriam, 16 West. Jur. 122; *Bank of Sherman v. Apperson*, 4 Fed. Reporter, 25; *Devendorf v. West Virginia Oil, &c. Co.*, 17 W. Va. 135; *Currier v. Lockwood*, 14 Am. L. Reg. n. s. 12; *Smith v. Allen*, 5 Day, 337; *Camden v. McKoy*, 4 Ill. 437; *Laidley v. Bright*, 17 W. Va. 779; *Mason v. Metcalf*, 4 Baxt. 440; *Leggett v. Jones*, 10 Wis. 34; *Blake v. Coleman*, 22 Wis. 415; *Kirk v. Dodge County Mut. Ins. Co.*, 39 Wis. 138; *Morgan v. Edwards*, 53 Wis. 599. Affixing a seal upon a promissory note does not, in North Carolina, destroy negotiability (*Pate v. Brown*, 85 N. C. 166); but inserting an engagement to pay an attorney's fee does, in Missouri (*First Nat. Bank v. Carthage*, 73 Mo. 35).

(a) *Miller v. Raca*, 1 Smith, L. C., 7th ed., p. 539. *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374; 42 L. J. Q. B. 183.

(b) If the order is for the payment of money on a contingency, the instrument is not negotiable. *Alexander v. Thomas*, 16 Q. B. 333; 20 L. J. Q. B. 207; As to limitations of liability indorsed on the face of the bill, see Meredith, *Ex parte*, 32 L. J. Ch. 302.

⁹⁷ See Appendix, Vol. III.

enable the transferee to sue in his own name upon such bill, provided the assignment has been made by the payee in conformity with mercantile custom, as settled and established by law. (c) In order to constitute a bill of exchange, it is essential that there should be a drawer, a drawee, and a payee; and though the payee may be described in any way, yet, in order that the bill should be valid, the payee must be named or otherwise indicated with reasonable certainty. (d) Although a bill of exchange drawn and accepted by the same party may be in strictness a promissory note, yet where the intention to give and receive such a document as a bill capable of being negotiated as such is clear, both the holder and the party may treat it accordingly. (e)

Transfer of Bills of Exchange.—If the written order, duly stamped, is made payable to “bearer,” it is transferable by mere delivery; (f) so that any *bona fide* holder or bearer of the instrument is entitled to maintain an action upon it in his own name as soon as it becomes payable. If, on the other hand, it is drawn “payable to order,” it can only be assigned by indorsement from the payee. (g) The indorsement may be written either on the back or the face of the bill, (h) and is sometimes an indorsement in full,—so called because the indorser not only writes his own name on the bill, but expresses therein in whose favor the indorsement is made, as “pay the contents to Mr. A. B.,”—and sometimes an indorsement in blank, when the name of the indorser himself alone appears upon the instrument, no mention being made of the indorsee. In the first case the indorsee can only transfer his interest in the bill by his own indorsement in writing; but in the second, he can transfer it by delivery only, so that any subsequent *bona fide* holder may treat the first indorsement in blank as a direct indorsement to himself, and bring an action in his own name upon the instrument. And this he might formerly do notwithstanding subsequent

(c) *Ellison v. Collingridge*, 9 C. B. Taylor, 34 L. J. C. P. 365; 19 C. B. 570; 19 L. J. C. P. 268; *Lloyd v. Oliver*, 21 ib. Q. B. 307; *Peto v. Reynolds*, 9 Exch. 410.

(e) *Willans v. Ayers*, 3 Ap. Cas. 133.

(f) *Gibson v. Minet*, 1 H. Bl. 606.

(g) *Edge v. Bumford*, 31 Beav. 247.

(h) *Young v. Glover*, 3 Jur. n. s. 637.

(d) See sect. 7 of Bills of Exch. Act, 1882, overriding *Yates v. Nash*, 29 L. J. C. P. 306; 8 C. B. n. s. 581; *M'Call v.*

* indorsements in full had been made thereon; (z) but [* 753] this appears to have been altered. Any number of persons, too, whether partners or not, may, it seems, join in suing upon a bill indorsed in blank. (k)

The bill may be indorsed before the day that it bears date (l) and before acceptance, and whilst the date and the amount for which it is drawn are left in blank; (m) and the acceptance and indorsement may be made before the bill is drawn; and a bill drawn and issued in blank for the name of the payee may, under certain circumstances, be filled up by a *bona fide* holder with his own name, and will bind the drawer. (n) So it has been held that where a bill is accepted in blank, and is afterward filled in with the name of a drawer and indorser by a forgery, still the acceptor is liable to a *bona fide* holder for value without notice of any irregularity. (o) If the bill be made payable by the fraud of the acceptor to a fictitious payee, a *bona fide* holder may recover upon the instrument as a bill payable to bearer. (p) If the indorsement is made before the bill has been filled up for any specific sum, the indorser may become liable to subsequent indorsees or holders to any amount warranted by the stamp. The indorsement is a letter of credit for an indefinite sum. (q) If the payee of a bill or money order, not negotiable, indorses it, he is liable on his indorsement to his indorsee. (r) The indorsee may treat the indorser as the drawer of a new bill or as the indorser of the old bill; but he cannot treat him as both. (s) Every indorser may be taken as the drawer of a fresh bill, inasmuch as he guarantees payment of the bill when at maturity by the acceptor. (t)

(i) *Fairclough v. Pavia*, 9 Exch. 695; 23 L. J. Ex. 215; *Wookey v. Pole*, 4 B. & Ald. 9.

(k) *Attwood v. Rattenbury*, 6 Moore, 579; *Ord v. Portal*, 3 Campb. 239; *Lowe v. Copestake*, 3 C. & P. 300.

(l) *Pasmore v. North*, 13 East, 517.

(m) *Snaith v. Mingay*, 1 M. & S. 87.

(n) *Schultz v. Astley*, 2 Bing. N. C. 544; 2 Sc. 815; *Crutchley v. Clarence*, 2 M. & S. 90; *Crutchley v. Mann*, 5 Taunt. 529.

(o) *London & S. W. Bank v. Went-*

worth, 5 Ex. D. 96; and see *Hogarth v. Latham*, 3 Q. B. D. 643, *post*, p. * 787; *contra*, where notice of irregularity.

(p) *Minet v. Gibson*, 3 T. R. 481; 1 H. Bl. 569; cited 1 Campb. 130.

(q) *Russell v. Langstaffe*, 2 Doug. 515, a; *Hatch v. Searles*, 2 Sm. & Giff. 152.

(r) *Hill v. Lewis*, 1 Sm. 132.

(s) *Burmester v. Hogarth*, 11 M. & W. 101.

(t) *Matthews v. Bloxsome*, 33 L. J. Q. B. 213. This case has been doubted;

"A bill of exchange is negotiable *ad infinitum*, until it has been paid by, or discharged on behalf of, the acceptor. If the drawer has paid the bill, he may sue the acceptor upon it; and if, instead of suing the acceptor, he put the bill into circulation upon his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill that the holder should be at liberty to sue the acceptor." (u) But when the [* 754] bill has * been paid by the acceptor or the person ultimately liable upon it, it has done its work, and is no longer a negotiable instrument. No person can sue on it; no person remains liable on it. If put into circulation again, it becomes a new bill, payable at sight, and must have a fresh stamp. An accommodation bill, paid by the drawer at maturity, cannot, therefore, be re-issued and negotiated. (x) A payment, however, before the bill becomes due "does not extinguish it any more than if it were merely discounted. A contrary doctrine would add a new clog to the circulation of bills and notes; for it would be impossible to know whether there had not been an anticipated payment of them." (y) If, therefore, the acceptor discounts the bill, he may re-issue it, and send it forth again into general circulation. (z)

Restrictive Indorsements.¹—The negotiability of the bill may be limited and restrained by the express terms of the indorse-

¹ This subject is treated in 1 Ames, Bills & N. 704; 2 ib. 837, tit. *Indorsement*, 6-8; Bigelow, Bills & N. 135, n.; Daniel, Negot. Instr. sect. 698; 2 Pars. Notes & B. 21; Story, Prom. N. sects. 138, 141-145; U. S. Dig. tit. *Bills and Notes*, sect. 1150.

Recent decisions are: First Nat. Bank v. Reno County Bank, 1 McCrary, 491; White v. National Bank, 102 U. S. 658; Williams v. Potter, 72 Ind. 354; Fawcett v. National Life Ins. Co., 5 Ill. App. 272; Lewis v. Dunlap, 72 Mo. 174; Hayden v. Strong, 23 Hun, 527; Mechanics' Bank v. Valley Packing Co., 4 Mo. App. 200. See also Barnard v. Cushing, 4 Met. 230; 38 Am. Dec. 362; Hueske v. Broussard, 55 Tex. 201.

On the subject of indorsement in blank, accommodation indorsement, indorsement to give the note credit with the payee, &c., see Bank of British North America v. Ellis, 2 Fed. Reporter, 44; Trust Co. v. National Bank, 101 U. S. 68; Railroad

see Steele v. M'Kinlay, 5 Ap. Cas. 754; (y) Burbridge v. Manners, 3 Campb. Penny v. Innes, 1 Cr. M. & R. 439. 193.

(u) Lord Ellenborough, Callow v. Lawrence, 3 M. & S. 95; Hubbard v. L. J. Ex. 244; Morley v. Culverwell, 7 Jackson, 4 Bing. 391. (z) Attenborough v. Mackenzie, 25 M. & W. 182.

(x) Lazarus v. Cowie, 3 Q. B. 465.

ment. Hence there are restrictive, conditional, and qualified indorsements. If the payee, by special indorsement, made a conditional transfer of the bill before acceptance, the drawee who accepted afterward was bound by the condition. (a) If the indorsement is accompanied by a notification that "the within must be credited to A," or a direction "to pay A for my use," every indorsee and subsequent holder has notice of the direction, and holds the bill, or the money he receives upon it, as the trustee of the restraining party. (b) But an indorsement: "Pay J. S., or order, value in account with H. C. D.," is not restrictive. (c) Where a bill of exchange had been indorsed in blank, and rendered generally negotiable, its negotiability could not afterward be restrained by subsequent restrictive indorsements; and the acceptor consequently must have paid the bill on presentment by the indorsee or holder; and if not paid, the indorsers were liable upon the instrument. (d) The amount to be recovered upon the bill cannot be split into separate sums by the indorsement, so as to subject the prior parties to a plurality of actions. (e) And if the bill be indorsed for part only of the amount, and the limitation do not appear upon the face of the indorsement, the indorsee may sue for the whole sum due upon the bill, and will be a trustee of the surplus for the indorser. (f)

Co. v. National Bank, 102 U. S. 14; *Perkins v. Catlin*, 11 Conn. 213, and note by A. C. Freeman, 29 Am. Dec. 297; *Camden v. McKoy*, 4 Ill. 91, and note by A. C. Freeman, 38 Am. Dec. 99; *Andrews v. Congar*, 20 Am. L. Reg. n. s. 328, and note by H. W. Rogers, ib. 331; *Kealing v. Van Sickle*, 74 Ind. 529; *Whitmore v. Nickerson*, 125 Mass. 496; *Lynch v. Goldsmith*, 64 Ga. 42; *Thacher v. Stevens*, 46 Conn. 561; *Howard v. Jones*, 10 Mo. App. 81; *Druhe v. Christy*, ib. 566; *Hayden v. Weldon*, 43 N. J. L. 128; *Converse v. Cook*, 25 Hun, 44; *Colgrove v. Tallman*, 67 N. Y. 99; *First Nat. Bank v. Wood*, 71 N. Y. 411; articles on Anomalous Indorsements, by O. F. Bump, 4 South. L. Rev. n. s. 539; on Irregular Indorsers, by J. A. Joyce, 15 Cent. L. J. 82; on Indorsement of Non-Negotiable Paper, by One Not a Party, 16 Alb. L. J. 44; 1 Abb. N. Y. Dig. (2d ed.) 491, note.

(a) *Robertson v. Kensington*, 4 Taunt. 30. But this is not so now; see Bills of Exch. Act, 1882. (d) *Walker v. Macdonald*, 2 Exch. 527; 17 L. J. Ex. 377; but this appears to have been altered by act of 1882.

(b) *Lloyd v. Sigourney*, 5 Bing. 525; 3 M. & P. 239; *Sigourney v. Lloyd*, 8 B. & C. 622. (e) *Hawkins v. Cardy*, 1 Ld. Raym. 360.

(c) *Buckley v. Jackson*, L. R. 3 Ex. 135. (f) *Reid v. Furnival*, 1 C. & M. 538; *Ex parte Newton*, 16 Ch. D. 330.

[* 755] * **Who is to be deemed a Bona Fide Holder by Indorsement.**¹ (*f*) — The first transfer, by indorsement, of a bill of exchange, is not effected by the mere act of the payee's writing his name on the back of the bill. There must be, as against the acceptor, a handing of the bill over, and a delivery of it to the transferee or his agent, with intent to make the person to whom it is delivered the holder of the bill, and to pass the property in it to him; and, as between the indorser and the indorsee, there must be an additional element of an intent to stand in the ordinary relation of indorser, that is, to guarantee the payment if the acceptor makes default. (*g*) There is no indorsement if the holder merely writes on the bill a direction to pay it to another person, and the other person gets possession of the bill without the holder's consent. Nor is there any indorsement, as between the indorser and his immediate indorsee, though the holder gives that person possession of the bill, if the delivery be merely for a collateral purpose, and without the intention to make him the transferee of the property in the bill, (*h*) or with the intention only of making him indorsee and

¹ As to who are *bona fide* holders of negotiable paper, see 1 Ames, Bills & N. c. 4, sect. 4; 2 ib. 863; Bigelow, Bills & N. 396; Daniel, Negot. Instr. c. 24; 1 Pars. Notes & B. c. 8, sect. 2; Story, Prom. N. sect. 191; U. S. Dig. tit. *Bills and Notes*, VI., 2; article on Rights of *Bona Fide* Purchasers of Under-Due Negotiable Paper secured by Mortgage, by G. W. McCrary, 8 South. L. Rev. n. s. 1; one on Damages in Actions founded on Negotiable Paper where Equities exist between the Original Parties, by J. J. Thomson, 18 Alb. L. J. 247.

See further, Railroad Co. v. National Bank, 102 U. S. 14; Oates v. National Bank, 100 U. S. 232; Wood v. Seitzinger, 2 Fed. Reporter, 284; Phoenix Ins. Co. v. Church, 81 N. Y. 218; Tilden v. Barnard, 43 Mich. 576; Farrell v. Lovett, 68 Me. 326; Sackett v. Johnson, 54 Cal. 107; Clark v. Callison, 7 Ill. App. 263; Atlantic State Bank v. Savery, 18 Hun, 36; Central Nat. Bank v. Valentine, ib. 917; Lewis v. Dunlap, 72 Mo. 174; West Boston Sav. Bank v. Thompson, 124 Mass. 506; Rickle v. Dow, 39 Mich. 91; Nichols v. Sober, 38 Mich. 678; Whitmore v. Nickerson, 125 Mass. 496; Thacher v. Stevens, 46 Conn. 561; Hunter v. Henninger, 93 Pa. St. 373; Bank of Salina v. Babcock, 21 Wend. 499; Essex County Bank v. Russell, 29 N. Y. 673; Park Bank v. Watson, 42 N. Y. 490; Chrysler v. Renois, 43 N. Y. 209; Aniba v. Yeomans, 39 Mich. 171; Sims v. Lyles, 1 Hill (S. C.), 39, 26 Am. Dec. 155; Dinsmore v. Stimbert, 12 Neb. 433.

(*f*) A "holder in due course" is defined by the act of 1882. (*h*) Lloyd v. Howard, 15 Q. B. 997; 20 L. J. Q. B. 1; Attenborough v. Clark,

(*g*) Denton v. Peters, L. R. 5 Q. B. 27 L. J. Ex. 138. 475.

owner of the bill on the performance of certain terms and conditions. (i) Where a testator wrote his name on the back of a bill payable to his order, and kept the bill in his possession, and his executrix after his death delivered the instrument to the plaintiffs without indorsing it, it was held that the writing of his name by the deceased, and the delivery by the executrix, would not together constitute an indorsement of the note, and that the party to whom it was delivered had consequently no right to sue upon it. (k) If the indorsement is intended to constitute a testamentary gift, it must be authenticated as such. (l)

But if the party to whose order the bill is payable writes his name on the back of the bill and hands it over to another who delivers it to a third person for value, that is an indorsement from the holder to such third person, and constitutes the latter the absolute owner of the bill. Where the drawer of a bill wrote his name on the back of it, and delivered it to a party to get it discounted, and the latter pledged the bill with a pawnbroker, and appropriated the money he received on the deposit of the bill to his own use, it was held that there was a valid indorsement of the bill from the drawer to the pawnbroker. (m) One who receives a bill of exchange (payable to order) unindorsed, acquires no better * title under it than that [* 756] which the person from whom he receives it had. Therefore, where A had fraudulently obtained a bill from B and handed it to C, in satisfaction of a *bona fide* debt, but without indorsing it, it was held that C could not acquire a legal title to sue by obtaining A's indorsement after he had received notice of the fraud. (n) But a transferee of an indorsed bill of exchange has all the rights of a holder for value, if it has been handed to him on account of a pre-existing debt, and is not affected by any infirmity of title in the transferor. (o) When the drawer or party to whose order the bill is payable has

(i) *Bell v. Lord Ingestre*, 12 Q. B. 317; 19 L. J. Q. B. 71; *Castrique v. Buttigieg*, 10 Moore, P. C. 109.

(k) *Bromage v. Lloyd*, 1 Exch. 35; 16 L. J. Ex. 257.

(l) *Mitchell v. Smith*, 33 L. J. Ch. 596.

(m) *Barber v. Richards*, 6 Exch. 63; 20 L. J. Ex. 135.

(n) *Whistler v. Forster*, 14 C. B. n. s. 248; 32 L. J. C. P. 161.

(o) *Belshaw v. Bush*, 11 C. B. 191; *Currie v. Misa*, L. R. 10 Ex. 153; 1 Ap. Cas. 554.

written his name on the back of the bill, and handed the bill over in the ordinary course of transfer, it is afterward transferable, as previously mentioned, from hand to hand, by mere delivery; and the consideration for each successive transfer cannot be inquired into, unless the bill has been stolen or obtained by misrepresentation or fraud. Any holder, therefore, who does not wish to sue in his own name on the bill may hand the bill over to another party, in order that the latter may sue upon it for him as his trustee. (*p*) But the bill must be handed over prior to the commencement of the action; for where the holder of a bill indorsed in blank, being unwilling to sue upon it himself, procured the plaintiff, who had no interest in the bill, to sue upon it, and handed the bill to the plaintiff after the commencement of the action, that the latter might produce it in court, it was held that the plaintiff was not entitled to recover upon it, as he was not the holder of the bill at the time he brought his action. (*q*) If, however, the bill has been indorsed and delivered to some person professing to act as the plaintiff's agent, although without his knowledge, and the plaintiff adopts the acts of the assumed agent, that is sufficient to entitle him to recover, although the action has been commenced in the plaintiff's name without his knowledge, and before the adoption. (*r*)

Intermediate Infirmities of Title. — A *bona fide* holder for value is not affected by an intermediate fraud or infirmity of title of which he had no knowledge or notice at the time he advanced his money on the credit and security of the bill of which he is the holder. Therefore, if a bill of exchange, indorsed generally, and handed over by a person competent to indorse it, is afterward stolen, and the thief delivers it for value to a [* 757] party who receives * it without notice of the theft, the latter has full authority to negotiate the bill or sue upon it. (*s*) Every person having possession of a bill of exchange has, notwithstanding any fraud on his part, either in acquiring or transferring it, full authority to transfer such bill,

(*p*) *Oulds v. Harrison*, 10 Exch. 579; (*r*) *Ancona v. Marks*, 7 H. & N. 686; 24 L. J. Ex. 69; *Law v. Parnell*, 7 C. B. 31 L. J. Ex. 163.

n. s. 282; 29 L. J. C. P. 17.

(*s*) *Peacock v. Rhodes*, 2 Doug. 634;

(*q*) *Emmett v. Tottenham*, 8 Exch. 384; 22 L. J. Ex. 281.

Raphael v. Bank of England, 17 C. B. 173; 25 L. J. C. P. 33.

but with this limitation, that to make such transfer valid there must be a delivery, either by him or some subsequent holder of the bill, to some one who receives such bill *bona fide* and for value, and who is either himself the holder of it or a person through whom the holder claims. (t)

When the Holder is bound to prove that he gave Value for the Bill.¹—When a bill of exchange is made payable to order, and is indorsed generally by the drawer, the indorsement is, as we have seen, tantamount to an order to pay the bill to the bearer or holder, so that the mere production of such a bill by a party in possession of it is *prima facie* evidence that he is a *bona fide* indorsee and holder of the bill; but this presumption of ownership and title arising from possession may be rebutted by proof that the bill had been lost by, or improperly obtained from, the owner, (u) or that the acceptance is a forgery; (x) and such evidence, if given, throws upon the holder the *onus* of proving that he gave value for the bill. Wherever the bill is proved to have been illegal or fraudulent in its inception, or where the immediate indorser to the plaintiff is shown to have obtained possession of it by fraud, the plaintiff may be called upon for proof that he gave value for the bill, and took it without notice of the illegality or fraud; and if such proof is not forthcoming, the plaintiff may be prevented from recovering upon the instrument. (y) Where one partner has accepted a bill in fraud of the other partners, and has applied the proceeds therefrom to his own use, the holder must show that he gave value for the bill. (z) But if it is not distinctly proved that the

¹ As to the giving of value for negotiable paper, see 1 Ames, Bills & N. c. 4, sect. 4 b; 2 ib. 867, sects. 8, 9; Bigelow, Bills & N. 497; Daniel, Negot. Instr. c. 24, sect. 2; U. S. Dig. tit. *Bills and Notes*, VI. 3. See authorities cited in note ante, p. * 755.

(t) Alderson, B., *Marston v. Allen*, 8 C. P. 58; *Smith v. Braine*, 16 Q. B. M. & W. 494; 11 L. J. Ex. 126; *Watson* 244; 20 L. J. Q. B. 201; *Berry v. Alderman*, 14 C. B. 95; 23 L. J. C. P. 34; *v. Russell*, 3 B. & S. 34; 31 L. J. Q. B. 304.

(u) *Bulkeley v. Butler*, 2 B. & C. 446. *Harvey v. Towers*, 6 Exch. 656; 20 L. J. Ex. 318; *Paterson v. Hardacre*, 4 C. P. 58; 1 C. B. n. s. 273. *Taunt.* 114.

(y) *Hall v. Featherstone*, 3 H. & N. 284; 27 L. J. Ex. 308; *Mather v. Ld. Maidstone*, 1 C. B. n. s. 273; 26 L. J. Musgrave v. Drake, 5 Q. B. 186.

note is tainted with illegality or fraud, the holder cannot be called upon to show that he gave value for the bill. (a) Notwithstanding the general rule, that the *onus* is on the maker of a negotiable instrument to show that it has been paid, the holder is bound in the first place (unless he is a derivative [* 758] indorsee for value during * the currency of the bill or note) to show that the maker received value for it. (b)

Fraudulent Transfers and Indorsements.— If the acceptance or indorsement has been fraudulently made, and the plaintiff is a party to the fraud, or takes the bill with full knowledge of the fraud and of the infirmity of the title of his assignor, he cannot sue upon the bill, although he has given full value for it; but an innocent indorsee, who has received the bill and given value for it, without notice of the fraud, may, it seems, transfer his title and right of action to a person who has knowledge of the original fraud, but is no party thereto. The latter may purchase the title and interest of the innocent indorsee, and so obtain a right of action upon the instrument. (c) If a person holds the bill for a specific purpose, as for the benefit of the drawer or acceptor, and indorses the bill over in breach of the trust reposed in him, the indorsee cannot, if he has notice of the trust at the time of the indorsement, acquire any better right or title to the bill than the indorser had; for by taking the bill under such circumstances he makes himself a party to a fraud. (d) If the holder is a mere agent, he will be affected with the infirmity of the title of his principal, and cannot have a better right upon the bill than his principal has. (e) If a bill obtained by fraud is handed over, without indorsement, to an innocent holder for value, and the indorsement is not made until after the holder becomes cognizant of the fraud, he cannot sue upon the bill. (f) If the party at the time of signing the bill is, without negligence on his part, misled as to the nature and contents of the document which he is signing, his signature will be of no force; for

(a) *Fitch v. Jones*, 5 Ell. & Bl. 245; (d) *Evans v. Kymer*, 1 B. & Ad. 528.
24 L. J. Q. B. 293. (e) *Solomons v. Bk. of Eng.*, 13 East,

(b) *Dettmar v. Metropolitan & Provincial Bank*, 1 H. & M. 641. 136. (f) *Whistler v. Forster*, 14 C. B.

(c) *May v. Chapman*, 16 M. & W. n. s. 255; 32 L. J. C. P. 161.
360.

his mind does not go with the signature, and it is in the view of the law no signature at all, and a *bona fide* holder for value cannot recover against a person who has signed under such circumstances. (g)

Accommodation Bills. — Where the bill has been accepted for the accommodation of the drawer without any consideration or value for the acceptance, and that was known to the indorsee at the time he took the bill, and the indorsee paid only part of the amount for which the bill was drawn, he can only recover the sum he actually paid for the bill. (h) So if part of the money due on the bill has been paid by the drawer, the holder can only recover the balance from the acceptor. (i)

Indorsement of Bills overdue. — Whenever the bill is due at * the time of the indorsement, "it comes [* 759] disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives a full consideration for it, he takes it on the credit of the indorser, and subject to all the infirmities with which it may be incumbered in his hands," (k) such as the payment or satisfaction of the bill itself to the prior holder. But the indorsee does not take it subject to claims arising out of collateral matters, such as the statutory right of set-off, which is merely a mode of preventing multiplicity of actions between the same parties. (l) An original absence of consideration, the acceptance being an accommodation acceptance, will not defeat the claim of an indorsee for value of an overdue bill, unless there was an express or implied agreement restraining the negotiation of the bill after it should become due. (m) It was held in one case that even if there was an agreement that the bill should not be negotiated after it was due, this would not affect a *bona fide* indorsee for value, who

(g) *Foster v. Mackinnon*, L. R. 4 C. 112; *Goggerly v. Cuthbert*, 2 B. & P. P. 704; 38 L. J. C. P. 310. N. R. 170.

(h) *Wiffen v. Roberts*, 1 Esp. 259.

(i) *Cook v. Lister*, 13 C. B. n. s. 543; 32 L. J. C. P. 121.

(k) *Crossley v. Ham*, 13 East, 503; *Burrough v. Moss*, 10 B. & C. 558; *Lloyd v. Howard*, 15 Q. B. 998; *Holmes v. Kidd*, 3 H. & N. 891; 28 L. J. Ex.

(l) *Oulds v. Harrison*, 10 Exch. 579; *Re Overend, Gurney, & Co., Ex parte Swan*, L. R. 6 Eq. 358.

(m) *Charles v. Marsden*, 1 Taunt. 224; *Sturtevant v. Ford*, 4 M. & Gr. 101; *Lazarus v. Cowie*, 3 Q. B. 464; *Parr v. Jewell*, 16 C. B. 684.

took the overdue bill without notice of the agreement. (*n*) If, pending an action on a bill of exchange, the bill is transferred to an indorsee, with notice, who brings a second action on the bill, that may be ground for the equitable interference of the court, but does not take away the negotiability of the instrument. (*o*)

Presentment for Acceptance. — The holder of an unaccepted bill should present it for acceptance without delay, in order that he may obtain the security of the acceptor. If acceptance is refused, the antecedent parties become liable immediately. Twenty-four hours at least ought to be allowed to the drawee to determine whether he will accept or not, if he requires time for consideration; but if he avows his determination not to accept, the holder may forthwith proceed against the antecedent parties; and if the acceptor clogs his acceptance with conditions and qualifications, the holder may treat his qualified acceptance as a refusal to accept, and give notice of dishonor. If he accepts the qualified acceptance, he must give notice of the nature of the acceptance to the prior parties. (*p*) When the bill is payable a

certain number of days after sight, it is to be accounted so many days after the bill shall be accepted or protested for non-acceptance. (*q*) The days are reckoned exclusively of [* 760] the day on * which the bill is accepted, and inclusively of the day on which it falls due. (*r*) If no time at all is stated upon the face of the bill, (*s*) or if it is payable at sight or on presentation, (*t*) the instrument will be payable on demand.

Proof of the Acceptance. — By the 19 & 20 Vict. c. 97, sect. 6 (reproduced by sect. 17 of Bills of Exchange Act, 1882), it is enacted, that no acceptance of any bill of exchange, whether inland or foreign, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorized by

(*n*) *Carruthers v. West*, 17 L. J. Q. B. 4. But see *Parr v. Jewell*, 16 C. B. 684.

(*o*) *Deuters v. Townsend*, 5 B. & S. 613; 33 L. J. Q. B. 301.

(*p*) *Rowe v. Young*, 2 B. & B. 240.

(*q*) *Campbell v. French*, 6 T. R. 212.

(*r*) *Coleman v. Sayer*, 1 Barnard, 303; *Bellaais v. Hester*, 1 Ld. Raym. 281; *Byles*, p. 134.

(*s*) *Abbott v. Douglas*, 1 C. B. 491.

(*t*) 34 & 35 Vict. c. 74.

him. (u) The acceptance is usually made by the drawee's writing across the bill the word "accepted," and signing his name thereto. Formerly, if the drawee merely wrote his name upon the face of the bill, without the word "accepted," or if he wrote "accepted," "presented," or any direction to pay addressed to a third party, or merely put his mark upon the bill, or promised in writing to accept or pay the bill, this was evidence for a jury of an acceptance of the instrument by him; (v) and so was a letter from his solicitor after action, admitting the signature to be in his handwriting. (x) Since the above statute, however, it was held that simply writing the name of the drawee across the face of the bill without any words indicating an intention to be bound as acceptor was not a valid acceptance. (y) But now, by the 41 Vict. c. 13, sect. 1 (reproduced by sect. 17 of Bills of Exchange Act, 1882), "An acceptance of a bill of exchange is not and shall not be deemed to be insufficient under the provisions of the said statute, by reason only that such acceptance consists merely of the signature of the drawee written on such bill." (z) If the name of the acceptor is written upon the bill by a third party, and the latter places his mark against the name as adopting such signature, there is a sufficient acceptance of the instrument. (a) If the drawee, after he has put his name to the bill, and before he has parted with the possession of it or notified his acceptance, changes his mind and runs his pen through the signature, the acceptance is cancelled, and he cannot be made liable upon the bill. (b)

Fictitious Indorsee.¹—If the acceptor has authorized the drawing and indorsement of the instrument in a particular form, or in the names of fictitious persons, he cannot afterward

¹ As to fictitious payees or indorsees, consult 2 Ames, Bills & N. 864, sect. 2 a; Bigelow, Bills & N. 570; Daniel, Negot. Instr. c. 5, sect. 2; 1 Pars. Notes & B. 32, 560; 2 ib. 48, 585, 591; Story, Prom. N. sects. 39, 132.

(u) *Fentum v. Pocock*, 5 Taunt. 196.

(v) *Powell v. Monnier*, 1 Atk. 612; *Ap. Cas.* 754; the effect of the statute is Bull. N. P. 270; *Wynne v. Raikes*, 5 East, 514; *Grant v. Hunt*, 1 C. B. 59. (z) And see *Steele v. M'Kinlay*, 5 Ap. Cas. 754; the effect of the statute is to overrule *Hindlaugh v. Blakey*, *supra*.

(x) *Chaplin v. Levy*, 9 Exch. 531.

(a) *George v. Surrey*, 1 M. & M. 516.

(y) *Hindlaugh v. Blakey*, 3 C. P. D.

(b) *Cox v. Troy*, 5 B. & Ald. 474.

[* 761] object *to such drawing or indorsement. (c) Nor where he has accepted in blank can he show that the drawing or indorsement is a forgery. (d)

Liability of the Acceptor — Failure of Consideration.¹ — As between the acceptor and the drawer of a bill, failure of consideration is an answer to an action for the amount of the bill, so that if a person purchases a bill payable at the end of three months for goods or money to be delivered to the acceptor at the end of one month, and the goods or the money are not delivered, the acceptor is not liable upon the bill, unless it was indorsed before it became due to a *bona fide* holder for value. (e) When the bill has been negotiated, the acceptor, except in case of a qualified acceptance, is bound to pay the bill at maturity, and to find out the holder for that purpose. He is not entitled to any presentment or formal demand of payment; and a request in the shape of the issue of a writ is the only request that need be made him by the indorsee, although the bill be made payable on demand. (f) A person who has accepted a bill of exchange cannot escape from liability to a *bona fide* indorsee by setting up a forgery of the name of the drawer. (g) "The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and his discharge *pro tanto* in his account with the drawer, and to one who should refuse or be unable to deliver up the bill, the acceptor is not bound, without an indemnity, to pay the sum therein specified." (h)

An acceptance of a bill of exchange can only be made by the party to whom the bill is addressed, or for his honor. An acceptance by any other person is not an acceptance within the usage and custom of merchants. Thus where one John Hart drew a bill payable to himself or order, and addressed it to himself "John Hart," and across the face of the instrument was

¹ See *infra*, p. * 779.

(c) *Ashpitel v. Bryan*, 5 B. & S. 723; 29 L. J. Ex. 161; *Puget de Bras v.* 32 L. J. Q. B. 91; 33 ib. 328. *Forbes*, 1 Esp. 117.

(d) *London & S. W. Bank v. Wentworth*, *ante*, p. * 753. (f) *Rumball v. Ball*, 10 Mod. 38.

(g) *Mather v. Maidstone*, 18 C. B.

(e) *Astley v. Johnson*, 5 H. & N. 141; 295; 25 L. J. C. P. 311.

(h) *Ramuz v. Crowe*, 1 Exch. 173.

written, "Accepted, H. J. Clarke," it was held that Clarke could not be sued as acceptor of a bill of exchange directed to him. Such a bill so accepted would appear to be a promissory note, made by the acceptor, to pay the sum mentioned therein to the drawer or his order. (i) But if the party to whom the bill is addressed writes his acceptance upon it in a name totally different from his own name, he will be liable upon the instrument, as he may accept it in any name he thinks fit to adopt. (k) Persons * may, as we have before seen, draw, [* 762] accept, or indorse bills in assumed or adopted names, and render themselves responsible upon the instrument by so doing; (l) but if the name of a party appearing on the face of a bill as drawer or indorser has been placed there without his authority, he cannot, of course, be made responsible upon the instrument, but the indorsee or holder must proceed against his own immediate indorsee, or the party from whom he got the bill. If the name of a party is misspelled, oral evidence is admissible to show who was intended. (m) The acceptor cannot set up as a defence to an action by an indorsee, that the drawer and first indorser was an uncertificated bankrupt at the time the acceptance was given. If he credits the bill of a bankrupt, he is responsible to every *bona fide* holder. (n) The acceptor is liable to indemnify any indorser who may pay the bill. (o)

Liability of the Drawer and Indorser.— Every person who draws or indorses a bill of exchange impliedly enters into a conditional contract to pay the amount of the bill to the payee or his assignee, if the acceptor does not pay the amount, unless he indorsed as agent for the plaintiff for the accommodation of the latter, and without value. (p) When a bill is dishonored, it is generally thrown back upon the first indorser, each indorser taking back from his immediate indorser what he has paid on account of the bill, and at the same time delivering up the bill

(i) *Davis v. Clarke*, 6 Q. B. 19; (n) *Braithwaite v. Gardiner*, 8 Q. B. 473; *Fielder v. Marshall*, 30 L. J. C. P. 158. 473; *Halifax v. Lyle*, 3 Exch. 453

(k) *Lindus v. Bradwell*, 5 C. B. 583; (o) *Duncan, Fox, & Co. v. North & South Wales Bank*, 6 Ap. Cas. 1.

(l) *Jenkins v. Morris*, 16 M. & W. 881. (p) *Castrique v. Buttigieg*, 10 Moore, P. C. 109.

(m) *Willis v. Barrett*, 2 Stark. 29.

to him, and the latter again throwing it back on his immediate indorser, till it at last arrives at the first indorser. They may arrange the matter amongst themselves; and any one indorser may sue the acceptor or drawer instead of any one of the preceding indorsers, striking out all the names upon the bill below his own. (*q*) But as the liability of the drawer and indorsers is a secondary and conditional liability, accruing only in default of payment by the acceptor, there must be proof of a regular presentment of the bill to the latter after it became due, and non-payment of the amount, termed a dishonor of the bill, and notice of such presentment and dishonor to the drawer or indorser, before the absolute liability of the latter upon the instrument can attach. Where the defendant was induced to put his name upon the back of a bill of exchange by the fraudulent representation of the acceptor that it was a guarantee, and the [* 763] defendant signed it without knowing that it * was a bill, and under the belief that it was a guarantee, and was guilty of no negligence in so signing it, it was held that he was not liable to a *bona fide* holder for value. (*r*) The indorser is in a position of secondary liability or *quasi* suretyship for the payment of a bill; and when the indorser has paid the bill he is entitled to any securities which may have been deposited by the acceptor with the holder. (*s*)

Giving Time for Payment. — The parties whose names appear upon the face of the bill are liable as principals and sureties, in the order in which they stand; and the rule that a release or discharge, or time given for payment to the principal, operates as a release or discharge to the surety (*ante*, p. * 661), is applicable to such instruments. By giving time, therefore, to the acceptor, the drawer and indorsers will be discharged. (*t*) But a binding agreement with a person who is no party to the bill to give time to the acceptor, without the consent of the drawer, does not dis-

(*q*) *Walwyn v. St. Quintin*, 1 B. & P. 658. *Moss v. Hall*, 5 Exch. 49; 19 L. J. Ex. 205; *Davies v. Stainbank*, 6 De G. M. & G. 679; *Greenough v. McClelland*, 2

(*r*) *Foster v. Mackinnon*, L. R. 4 C. P. 704; 38 L. J. C. P. 310. *El. & El.* 424; *Lawrence v. Walmsley*, 12 C. B. n. s. 799; 31 L. J. C. P. 143;

(*s*) *Duncan, Fox, & Co. v. North & S. Wales Bank*, 6 Ap. Cas. 1. *ante*, pp. * 660, * 661.

(*t*) *English v. Darley*, 2 B. & P. 61;

charge the drawer. (*u*) As between the holder and the acceptor, the acceptor is the principal debtor, and the drawer and indorsers are his sureties; but as between the holder and the drawer, the drawer is the principal debtor, and the indorsers are his sureties; and as between the holder and second indorser, the second indorser is the principal, and the subsequent or third indorser is his surety. A discharge, therefore, to the prior parties, the principals, is a discharge to the subsequent parties, the sureties; but a discharge to the subsequent parties, the sureties, is not a discharge to the prior parties, the principals. (*x*)

Presentment for Payment.—There is a sufficient presentment of the bill for payment, if payment has been demanded of the wife, clerk, or other agent of the drawee or acceptor at his residence, or at his customary place of business. If the drawee be dead, the presentment must be made to his personal representatives, and if he have none, then at his last place of residence. When it is made at the place of business of the acceptor, it should be made during the usual hours of business; (*y*) and when it is made at his place of residence, it should be made at a period of the day or evening when he may reasonably be expected to be found there. (*z*) “The holder is to present promptly, and to * communicate without delay notice of [* 764] non-payment or of the insolvency of the acceptor; for a party is not only entitled to knowledge of insolvency, but to notice that, in consequence of such insolvency, he will be called upon to pay the amount of the bill.” (*a*) If the acceptance is a conditional acceptance, the condition must be strictly accomplished; but the holder is not bound to present the bill the very day that it becomes due, unless the condition is express to that effect. (*b*) If the bill is accepted payable at a particular place, it is not necessary, in order to charge the acceptor upon the bill, that it should be presented for payment at that place, unless the acceptor expressly specifies on the face of the bill that it will be

(*u*) *Frazer v. Jordan*, 8 Ell. & Bl. 308; 26 L. J. Q. B. 288.

(*x*) *Byles*, 179; *ante*, pp. * 660, * 661. 383.

(*y*) *Elford v. Teed*, 1 M. & S. 28; *Whitaker v. Bank of England*, 1 C. M. & R. 744.

(*z*) *Wilkins v. Jadis*, 2 B. & Ad. 188.

(*a*) *Camidge v. Allenby*, 6 B. & C.

(*b*) *Smith v. Vertue*, 30 L. J. C. P.

paid there and nowhere else. But the drawer cannot be charged upon a bill made payable by him at a place indicated, unless the bill has been presented at that place. If the acceptor accepts, payable at a banker's, he undertakes (1 & 2 Geo. IV. c. 78, reproduced by sect. 19 of the Act of 1882) to pay the bill at maturity, when presented for payment either to himself or at the banker's; if he accepts payable at a banker's and not elsewhere, he contracts to pay the bill at maturity, provided it is presented at the banker's, but not otherwise. (c) The statute is confined to the case of acceptors, and does not alter the liability of drawers of bills of exchange. Therefore if the drawer has directed by the body of the bill that the amount he draws for shall be paid at a particular place, the bill must be presented at that place, before he (the drawer) can be made responsible for non-payment. (d) If the banker at whose bank the bill is payable is the holder of the bill at the time of its maturity, there is a sufficient presentment. If the bill is made payable at a particular town, and the holder goes there with the bill, and makes inquiry for the party to whom it is to be presented, and the latter is not to be found, this is a sufficient presentment at the place indicated. (e) If the bill is made payable at a particular house, presentment to an inmate may suffice; (f) or if the house be shut up, at the house door; (g) and if two places be named, the holder has the option to present it at either. (h) "A presentment according to the directions of a forged acceptance cannot be a good presentment as against the drawer." (i) The mention of the names and address of the London agents in a memorandum at the foot of a country banker's cheque does not [* 765] * make the cheque payable at the place so indicated; and non-payment there on presentment is not necessarily a dishonor. (k)

Non-Presentment, when excused. — (See sect. 46, Act of 1882.)
If the acceptor absconds, or shuts up his house and cannot be

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| (c) <i>Halstead v. Skelton</i> , 5 Q. B. 93. | (g) <i>Hine v. Allely</i> , 4 B. & Ad. 624. |
| (d) <i>Gibb v. Mather</i> , 1 M. & Sc. 387; | (h) <i>Beeching v. Gower</i> , Holt, N. P. |
| <i>Saul v. Jones</i> , 28 L. J. Q. B. 37. | 314. |
| (e) <i>Hardy v. Woodroffe</i> , 2 Stark. | (i) <i>Wetton v. Hodd</i> , 18 Jur. 630. |
| 319. | (k) <i>Bailey v. Bodenham</i> , 16 C. B. |
| (f) <i>Buxton v. Jones</i> , 1 M. & Gr. 83. | n. s. 288; 33 L. J. C. P. 252. |

found, presentment is excused, because it cannot be made, and the bill may be treated as a dishonored bill; but if the acceptor has merely removed to a different residence, and can be discovered, the bill must be presented in the regular way. (*l*) Neither the bankruptcy of the drawee or acceptor, nor a declaration by him that he will not pay the bill, is of itself an excuse for an omission to present for payment; (*m*) but if a banking firm in partnership has notoriously stopped payment and shut up its ordinary place of business, and immediate notice of the insolvency of the firm is given by the holder to the other parties, he will be entitled to recover upon the bill, although there has been no formal presentment. (*n*) If the bill is a mere accommodation bill, and the acceptor had no effects of the drawer's in his hands during any portion of the period that the bill had to run, and the drawer could have had no reasonable expectation that the bill would be honored by the acceptor, presentment to the latter is excused as against the drawer, as the latter cannot have been prejudiced by the want of presentment; for "if the bill was presented and paid by the drawee, the drawer would become indebted to him in the amount, instead of being indebted to the holder of the bill." (*o*) "But the case of an indorser of a bill of exchange stands upon a different footing from that of a drawer. He (the indorser) is in the nature of a surety or guarantor of its payment on due presentment, and is presumed to know nothing about the arrangement between the drawer and drawee." (*p*) His liability, therefore, upon the bill does not arise until presentment has been duly made, and he has received notice of dishonor.

Days of Grace are so called because they were formerly allowed the drawee as a favor; but the laws of commercial countries have long since recognized them as a right. The number of these days varies in different places. The three days of grace

(*l*) *Collins v. Butler*, 2 Str. 1087.

In re, L. R. 6 Eq. 368; ib. 4 Ch. 18; 38

(*m*) *Sands v. Clarke*, 8 C. B. 759; L. J. Ch. 121, and *Chalmers on Bills*, 19 L. J. C. P. 87.

art. 168.

(*n*) *Turner v. Stones*, 1 D. & L. 122;

(*o*) *Terry v. Parker*, 6 Ad. & E. 507.

Robson v. Oliver, 16 L. J. Q. B. 437;

(*p*) *Carter v. Flower*, 16 L. J. Ex.

but see *East of England Banking Co.*, 202.

allowed in this country are reckoned exclusive of the day on which the bill falls due, and inclusive of the last day of grace. Where there are no days of grace, and the bill falls due on a Sunday, Christmas Day, Good Friday, public fast or thanksgiving day, or where the last of the days of grace happens [* 766] on such a day, the bill becomes payable on the day preceding, and if not then paid must be treated as dishonored. (Sect. 14, Act of 1882.) If the last day is one of the public holidays established by the 34 Vict. c. 17, and 38 & 39 Vict. c. 13, the bill is payable on the day following. (g) Presentment for payment before the expiration of the days of grace is premature, and will not enable the holder to charge the antecedent parties. (r) By the Bills of Exchange Act, 1871, (s) after reciting that doubts had arisen whether a bill payable at sight or on presentation was payable until the expiration of a certain number of days of grace, it is enacted (sect. 2) that every bill of exchange or promissory note drawn after that act came into operation, (t) and purporting to be payable at sight or on presentation, shall bear the same stamp as, and shall for all purposes whatsoever be deemed to be, a bill of exchange or promissory note payable on demand.

Notice of Dishonor.¹ — (See sect. 49 of Bills of Exchange Act, 1882.) If the bill has been duly presented to the acceptor, and the days of grace have elapsed, and the bill remains unpaid, the holder should give prompt notice of the dishonor of the bill to all the other parties to the instrument against whom he in-

¹ Consult 2 Daniels, *Negot. Instr.* 87; Story, *Bills*, sect. 288; Story, *Prom. N.* sect. 324; see also article on the Relations between the Holder and the Drawer or Indorser of Negotiable Paper, by T. T. Gantt, 4 *South. L. Rev.* n. s. 406; *Westfield v. Ludlow*, 6 *Fed. Reporter*, 348; *Smith v. Poillon*, 87 *N. Y.* 590; *Ransom v. Mack*, 2 *Hill (N. Y.)*, 587, and an exhaustive note by A. C. Freeman, 38 *Am. Dec.* 607; *Smedes v. Bank of Utica*, 20 *Johns.* 372; *Mead v. Engs.* 5 *Cow.* 303; *Sewall v. Russell*, 3 *Wend.* 276; *Howard v. Ives*, 1 *Hill (N. Y.)*, 263; *Haskell v. Boardman*, 8 *Allen*, 38; *Sussex Bank v. Baldwin*, 17 *N. J. L.* 487; *Burgess v. Vreeland*, 24 *N. J. L.* 71; *Lawson v. Farmers' Bank*, 1 *Ohio St.* 206; *Freeman's Bank v. Perkins*, 18 *Me.* 292; *Chick v. Pillsbury*, 24 *Me.* 458; *Whitwell v. Johnson*, 17 *Mass.* 449; *Kramer v. Sandford*, 4 *W. & S.* 328, 39 *Am. Dec.* 92, and note.

(g) 34 *Vict. c.* 17.

(s) 34 & 35 *Vict. c.* 74. Reproduced

(r) *Byles*, 5th ed. 150, 151; *Tassell v.* by Bills of Exch. Act, 1882.

Lewis, 1 *Ld. Raym.* 743.

(t) *Aug. 14th*, 1871.

tends to proceed. (u) It is not necessary to give notice to the trustee of a bankrupt if notice be given to the bankrupt himself. (x) Each indorser is entitled to notice, but not the drawee or acceptor to whom the bill has been presented for payment. The notice should be given by the holder and by each party who intends to sue on the bill, within one day, or at the latest, twenty-four hours, after he has received information of the dishonor of the bill, if the residences or places of business of the parties can be discovered with due and reasonable diligence. (y) But this rule applies only as between the parties to a bill, and does not give a day for communication between the agent of the holder of a bill and such holder who resides at a distance. (z) A plaintiff in an action on the bill need not himself have given all the notices; he may avail himself of a notice duly given by any other party to the bill. (a) When the bill becomes payable on the Sunday, Good Friday, or Christmas Day, the notice need not be given until the day after. (b) Where a bill of exchange was *indorsed to a branch bank of a London [*767] banking-house, who sent it to another branch of the same bank, who indorsed it to the head establishment in London, it was held that each of the branch banks was to be considered an independent indorsee or holder, and each entitled to the usual notice of dishonor. (c) Any agent in possession of the bill may give the notice; and it need not state at whose request it was given, nor who was the owner of the bill. Any persons also who pay the bill for the honor of a party thereto, become on payment, holders as upon a transfer from the person for whom they made the payment, and are entitled to avail themselves of a notice of dishonor given by any of the parties to the bill. (d)

What amounts to Notice of Dishonor.—(See sect. 49 of the Bills of Exchange Act, 1882.) A mere demand of payment of

(u) *Maltass v. Siddle*, 6 C. B. N. S. 501; 28 L. J. C. P. 257. Criddle, L. R. 4 Q. B. 460; 38 L. J. Q. B. 232.

(x) *Ex parte Baker*, 4 Ch. D. 795, C. A. (a) *Jervis, C. J., Rowe v. Tipper*, 13 C. B. 256; 22 L. J. C. P. 135.

(y) *Gladwell v. Turner*, L. R. 5 Ex. 59; 39 L. J. Ex. 31. (b) 7 & 8 Geo. IV. c. 15; 6 & 7 Will. IV. c. 58, sect. 2. (Repealed and reproduced by Bills of Exch. Act, 1882.)

(z) *Leeds Banking Co., In re*, L. R. 1 Eq. 1; 35 L. J. Ch. 33; *Prideaux v.* (c) *Clode v. Bayley*, 12 M. & W. 51.

(d) *Goodall v. Polhill*, 1 C. B. 242.

a bill does not amount to notice of dishonor; (e) but an intimation that the bill has not been paid by the acceptor, or that it has not been paid in regular course, accompanied or unaccompanied by a demand of payment, will be sufficient. (f) A mistake in the name of the person on whose behalf the notice is given will not avoid the notice, but will place the party giving it in the same situation as to the party to whom it is given as if the representation had been true, so that the defendant will have every defence against the plaintiff that he would have had if the notice had been really given by the party named. (g) A misdescription, also, of the bill, not misleading the party receiving the notice, will not vitiate such notice. (h) If the bill has really been dishonored at the time the notice is given, but the party giving the notice was not himself certain of the fact at the time he gave the notice, it is no objection to the notice. (i) The notice may be either written or verbal. Any form of words conveying information to the mind of the party to whom it is addressed, that the bill has been presented and dishonored, given to the party, or left at his usual place of business during business hours, or at his private residence, is sufficient. (k) If the house is shut up, and the party sent to give notice puts a [* 768] written notice *through or under the door, that will suffice. (l) It is also sufficient if the notice is sent to a place which the indorser has held out as a place where he is likely to be found for the purpose of receiving notice, although it is neither his place of business nor his residence. (m)

Posting the Notice.—The notice of dishonor should, if pos-

(e) *Solarte v. Palmer*, 7 Bing. 530; 2 Cl. & F. 97; *Strange v. Price*, 10 Ad. & E. 125; *Leeds Banking Co., In re, supra*.

(f) *Bailey v. Porter*, 14 M. & W. 44; *Paul v. Joel*, 4 H. & N. 355; 28 L. J. Ex. 143.

(g) *Parke, B., Harrison v. Ruscoe*, 15 M. & W. 236; 15 L. J. Ex. 110.

(h) *Bromage v. Vaughan*, 16 L. J. Q. B. 10; *Rowlands v. Springett*, 14 M. & W. 7; *Mellersh v. Rippen*, 21 L. J. Ex. 222.

(i) *Jennings v. Roberts*, 24 L. J. Q. B. 104.

(k) *Phillips v. Gould*, 8 C. & P. 355; *Hartley v. Case*, 4 B. & C. 341; 6 D. & R. 505; *Lewis v. Gompertz*, 6 M. & W. 403; *East v. Smith*, 16 L. J. Q. B. 295; *Carter v. Flower*, ib. Ex. 201; *Chard v. Fox*, 14 Q. B. 201; *Everard v. Watson*, 22 L. J. Q. B. 222; *Caunt v. Thompson*, 7 C. B. 411; 18 L. J. C. P. 128; *Metcalf v. Richardson*, 11 C. B. 1011; *Maxwell v. Brain*, 10 Jur. n. s. 777.

(l) *Allen v. Edmundson*, 2 Exch. 723; *Housego v. Cowne*, 2 M. & W. 348.

(m) *Berridge v. Fitzgerald*, L. R. 4 Q. B. 639; 38 L. J. Q. B. 335.

sible, be communicated by the next post, if a post leaves within a few hours after information of the dishonor of the bill. (*n*) If the letter, by the mistake of the postmaster, does not reach its destination, the party who posts it will not suffer; he does all that is usual and necessary, and does not guarantee the correctness of the post-office delivery. (*o*) But the letter, when sent by post, must of course be properly directed; and when it is sent to a large town, the street and number of the house in which the party to whom the notice is given resides should be stated, (*p*) unless the latter is the drawer of the bill, and states his address in an equally general manner. (*q*) Where the address is the only one known to the senders, it is sufficient. (*r*) An action is maintainable immediately after the notice has been received by the party to whom it is addressed; and it is sufficient for the plaintiff to show that the defendant must have received it according to the usual routine of the post-office delivery prior to the issuing of the writ. (*s*)

Foreign Bill — Protest¹ — Noting — Damages — Re-exchange.

— When a foreign bill is refused acceptance or payment, the dishonor must be announced by a PROTEST, which should be made by a notary public, or if there be none, by an inhabitant of the place where the bill is payable, in the presence of two witnesses. (*t*) The protest simply announces the presentment and non-acceptance or non-payment of the bill. Noting is a minute made on the bill by the officer at the time of the refusal to accept, and is the preparatory step to protest. Notice of protest and of the dishonor of a foreign bill should always be sent by the first available opportunity. (*u*) If a foreign bill is taken up and paid for honor, the payment must be preceded or accompanied by a declaration, made in the presence of a notary, for whose honor the party pays the bill, which should be recorded by the notary * either on the protest [* 769]

¹ As to notice of protest, see *ante*, p. * 766.

(*n*) *Darbishire v. Parker*, 6 East, 8.

(*r*) *Ex parte Baker*, 5 Ch. D. 795,

(*o*) *Parke, B., Woodcock v. Houlds-*

C. A.

worth, 16 L. J. Ex. 49; 16 M. & W. 124.

(*s*) *Castrique v. Bernabo*, 6 Q. B. 498.

(*p*) *Walter v. Haynes, R. & M.* 149.

(*t*) *Byles*, 5th ed. 189.

(*q*) *Clarke v. Sharp*, 3 M. & W. 166;
Burmester v. Barron, 17 Q. B. 828.

(*u*) *Muilman v. D'Eguino*, 2 H. Bl.
565.

or in a separate instrument. (x) A bill of exchange payable in France, though drawn in England, is a foreign bill; and notice of dishonor according to French law is sufficient in an action against an indorser in England. (y) The drawer in a foreign country is entitled to recover from the acceptor not only the amount of the bill with interest, but also all such reasonable expenses, including re-exchange, as are caused by the dishonor. (z)

Proof of Notice of Dishonor. — A promise by the defendant, after the bill becomes due, to pay the amount thereof, or a part payment, or the offer of it, or an admission by the defendant of his liability upon the bill, is evidence that notice of dishonor was duly given, (a) or that without such notice the defendant is the proper person to pay the bill. (b) A promise, after the bill is due, to pay the holder the amount of the bill, operates as "an admission on the part of the defendant that the holder had a right to resort to him upon the bill;" and "if when payment is demanded, the party omits to avail himself of the preliminary objection of want of protest or want of notice, it is a question of fact whether he does not thereby admit that all the steps that are essential to create liability in him have been duly taken." (c) If the defendant has suffered judgment by default in a prior action against him on the same bill, this is an admission by him of his liability upon the instrument, so as to dispense with proof of notice of dishonor. (d)

Dispensation of Notice. — (See sect. 50, Act of 1882.) Notice of the dishonor of a bill may be dispensed with and excused by the conduct and declaration of the party otherwise entitled to it. If the party to whom the notice is to be given absents himself from his place of business, and the holder goes or sends there, and finds no one to receive the notice, this is equivalent to a dispensation of notice, since, according to the usage of merchants,

(x) *Geralopulo v. Wieler*, 10 C. B. 719. Bing. N. C. 229; 5 Sc. 598; *Brownell v. Bonney*, 1 Q. B. 39; *Jackson v. Collins*, 17 L. J. Q. B. 142.

(y) *Hirschfield v. Smith*, L. R. 1 C. P. 340; 35 L. J. C. P. 177; *Horne v. Rouquett*, 3 Q. B. D. 514. (b) *Potter v. Rayworth*, 13 East, 418. (c) *Campbell v. Webster*, 2 C. B. 265.

(z) *In re General South American Co.*, 7 Ch. D. 637. (d) *Rabey v. Gilbert*, 6 H. & N. 536; 30 L. J. Ex. 170.

(a) *Hicks v. Duke of Beaufort*, 4

a man who puts his name to a bill ought to be ready at his place of business to receive notice of dishonor. (e) Where the drawer stated to the holder of the bill, a few days before the bill became due, that he had no regular residence to which notice could be sent, and that he would himself call upon the acceptor and see if the bill was * paid, it was held that [* 770] he had thereby expressly dispensed with notice of dishonor from the holder. (f) It has been also held that notice of dishonor to the drawer had been dispensed with or waived in the following cases:— where the drawer had himself countermanded the payment of the bill; (g) where he stated, the day before a bill became due, that it would not be paid, and that it was not worth while to trouble him with a post letter to give him notice; (h) where his residence was unknown, and the holder could not, by the exercise of reasonable diligence and inquiry, discover it; (i) where he had made the bill payable at his own house; (k) where he had no effects at any time in the hands of the acceptor, and would have no remedy against the acceptor or any other person in consequence of his being obliged to pay the bill; (l) where he had not sufficient effects in the hands of the acceptor at the time when he would reasonably expect the bill to be presented for payment, and no reasonable expectation that it would be paid; (m) where, although goods had been sold by him to the drawee, yet a long period of credit had been given, and he had drawn the bill without any reasonable expectation that it would be accepted or paid. (n) And a waiver of notice of dishonor may be inferred from a subsequent promise to pay, or any admission of liability on the bill by the party entitled to notice. (o)

If the drawer draws on a person who is not his debtor, nor

(e) *Allen v. Edmundson*, 17 L. Ex. 291; 2 Exch. 723.

(f) *Phipson v. Kneller*, 4 Campb. 285.

(g) *Hill v. Heap*, D. & R. N. P. C. 57.

(h) *Burgh v. Legge*, 5 M. & W. 421.

(i) *Bateman v. Joseph*, 2 Campb. 461.

(k) *Sharp v. Bailey*, 9 B. & C. 45.

(l) *Cory v. Scott*, 3 B. & Ald. 622;

Thomas v. Fenton, 5 D. & L. 39.

(m) *Carew v. Duckworth*, L. R. 4 Ex. 313; 38 L. J. Ex. 149.

(n) *Claridge v. Dalton*, 4 M. & S. 231.

(o) *Woods v. Dean*, 3 B. & S. 101;

32 L. J. Q. B. 1; *Cordery v. Colville*, ib.

C. P. 210; 14 C. B. n. s. 374; *Rabey v.*

Gilbert, 6 H. & N. 536; 30 L. J. Ex.

170.

has received any value for the bill, the bill must be considered *prima facie* an accommodation bill. In such a case, the drawer is himself the person who ought to provide funds and pay the bill; and he is not, consequently, entitled to notice of dishonor. (*p*) But the case is otherwise where the drawer has a fluctuating balance in the hands of the drawee; (*q*) for the drawer has a right to notice of dishonor, if he has effects in the hands of the acceptor at any time from the drawing of the bill till it becomes due. (*r*) But the state of the accounts as between the drawer and drawee does not in anywise do away with the necessity of notice of dishonor to the indorser. When the action is brought against the latter, "it is not enough, even *prima facie*, to dispense with notice, simply to state that he had [* 771] indorsed without value, or had * no effects in the hands of prior parties." And an allegation that no damage was sustained by him from want of notice is clearly insufficient. The indorser stands, as we have seen, upon a different footing from the drawer. If he has indorsed to the holder without value or effects in the hands of prior parties, it does not follow that he is not entitled to notice; for he may have indorsed for the accommodation of others, when he will have a right to notice, because on payment he may recover against those persons. (*s*) Where the intention of all parties to an accommodation bill was that it should be met by the last indorser, the previous indorsers cannot be sued unless they have had notice of dishonor. (*t*) The bankruptcy of the drawee or acceptor, however notorious, constitutes no excuse for an omission to give notice of dishonor; (*u*) and the knowledge of the bankruptcy by the party entitled to notice is not equivalent to notice. (*x*)

Transfer by Delivery without Indorsement. — (See sect. 58, Act of 1882.) A transfer by mere delivery without indorsement does not, as we have before seen, render the transferor liable to

(*p*) *Bickerdyke v. Bollman*, 1 T. R. 199; 16 M. & W. 743; *Maltass v. Siddle*, 28 L. J. C. P. 257; 6 C. B. N. S. 405.

(*q*) *Blackham v. Doran*, 2 Campb. 501; *Foster v. Parker*, 2 C. P. D. 18.

503. (*t*) *Turner v. Samson*, 2 Q. B. D. 23.

(*r*) *Hammond v. Dufrene*, 3 Campb. 164. (*u*) *Thackeray v. Blackett*, 3 Campb.

145. (*s*) *Carter v. Flower*, 16 L. J. Ex. 164. (*x*) *Esdaile v. Sowerby*, 11 East, 114.

the transferee upon the bill itself, although he may under certain circumstances become liable to refund the money he received in exchange for the bill, if the bill is dishonored at maturity and turns out to be a mere piece of waste paper. If a man goes into the money market with a bill of exchange and gets it discounted without putting his name upon the back of it, and in effect sells the bill for what he can get for it, he is not responsible for the repayment of the money he received in exchange for it, if the parties to the bill turn out to be insolvent, and the bill becomes worthless, unless he knew of the insolvency and the consequent worthlessness of the bill at the time he offered it for sale in the market. (y) But if the bill is a forgery, and is not what it purports upon the face of it to be, the transferor is bound to refund the money he received by way of discount upon the bill, as the transferee has not got what was agreed to be transferred to him in exchange for his money, and there is, consequently, a total failure of the consideration for the money. (z)

Bills taken up *supra protest*. — (See sect. 68, Act of 1882.) A person who takes up a bill *supra protest* for the benefit of a particular party to the bill, succeeds to the title of the party from whom, not for whom, he receives it, and has all * the [* 772] title of such person to sue upon the bill, except that he discharges all the parties subsequent to the one for whose honor he takes it up, and that he cannot himself indorse it over. (a)

Retiring of Bills by Acceptors and Indorsers. — “If an acceptor retires a bill at maturity, he takes it entirely from circulation, and the bill is in effect paid; but if an indorser retires it, he merely withdraws it from circulation in so far as he himself is concerned, and may hold the bill with the same remedies as he would have had, had he been called upon in due course, and had paid the amount to his immediate indorsee.” (b)

Payment and Satisfaction of a bill of exchange as between a drawer or indorser and an indorsee, whether before or after the

(y) *Fenn v. Harrison*, 3 T. R. 579; (a) *Re Overend, Gurney, & Co., Ex parte Shuttleworth*, 3 Ves. 368; *Fy. parte Swan*, L. R. 6 Eq. 344.
dell v. Clark, 1 Esp. 447. (b) *Jervis, C. J., Elsam v. Denny*, 15

(z) *Gurney v. Womersley*, 4 Ell. & C. B. 94; 23 L. J. C. P. 192.
Bl. 133; 24 L. J. Q. B. 47.

bill becomes due, does not inure as a satisfaction on behalf of the acceptor, or operate to discharge him from liability to the indorsee, (c) unless the bill is an accommodation bill, (d) but the indorsee on recovering from the acceptor is a trustee for the drawer or indorser, as the case may be, for the amount of the payment. (e) If, however, the acceptor has a set-off against the person making such payment, he may set it off against the indorsee to the extent of the payment so made. (f) Satisfaction should always be made to the holder and proprietor of the bill; and payment to any other party will not discharge the acceptor, unless the money reaches the holder, and the latter treats it as received in liquidation of the bill. Payment to the holder is good, although the latter may have stolen the bill or become wrongfully possessed of it, provided the payment be *bona fide* in the usual course of business. (g)

Promissory Notes.¹—By the 3 & 4 Anne, c. 9, now reproduced by sects. 83, 89 of Bills of Exchange Act, 1882, it is enacted that all notes in writing made and signed by any person, body politic or corporate, or by the servant or agent of any corporation, banker, or trader usually intrusted to sign promissory notes, whereby such person, body politic, &c., shall promise to pay to any other person or persons, &c., his or their order, or unto bearer, any sum of money mentioned in such note, shall be assignable or indorsable over in the same manner as inland bills of exchange. Any order or promise in writing, therefore, for the payment of a certain or definite sum of money absolutely

¹ As to the form of negotiable promissory notes, see authorities cited in note, *ante*, p. * 751, also Ann. Dig. for 1870, 1871, 1872, tit. *Promissory Notes*. See further, *Johnston v. Speer*, 92 Pa. St. 227; *First Nat. Bank v. Bynum*, 84 N. C. 24; *Rominger v. Keyes*, 73 Ind. 375; *Bannister v. Rouse*, 44 Mich. 428; *Lynch v. Goldsmith*, 64 Ga. 42; *Cushing v. Field*, 70 Me. 50; *Costello v. Crowell*, 127 Mass. 293; *Noxon v. Smith*, ib. 485; *Schoharie County Nat. Bank v. Bevard*, 51 Iowa, 257; *Newton Wagon Co. v. Diers*, 10 Neb. 284; *Aniba v. Yeomans*, 39 Mich. 171; *Third Nat. Bank v. Armstrong*, 25 Minn. 530; *Bellas v. Keyser*, 17 Fla. 100; *Heard v. Dubuque County Bank*, 8 Neb. 10; *Carnahan v. Pell*, 4 Col. 190; *Petillon v. Lorden*, 86 Ill. 361; *Johnson v. Blasdale*, 1 Smed. & M. 17, 40 Am. Dec. 85, and note, ib. 87.

(c) *Jones v. Broadhurst*, 9 C. B. 173;
Randall v. Moon, 12 C. B. 261.

(e) *Jones v. Broadhurst*, 9 C. B. 173.

(f) *Thornton v. Maynard*, L. R. 10

(d) *Cook v. Lister*, 32 L. J. C. P. C. P. 695.

121; 13 C. B. n. s. 543.

(g) *Williams v. James*, 15 Q. B. 498.

and unconditionally to a person therein named, or "to * his order," or "to bearer," duly stamped, will constitute a negotiable promissory note. (*h*) A promise, also, in writing to pay a sum of money to bearer, without mentioning any particular person by name, or a promise to pay to a fictitious person or bearer, is a negotiable note within the statute. (*i*) A promise to pay "to A, B, and C, or to their order, or the major part of them, £100," is a promissory note. (*k*) If it appears doubtful whether the instrument was intended to be a bill or a note, it may be treated either as the one or the other, at the election of the payee. (*l*) An instrument in the form of a bill of exchange addressed to no one, but accepted by the defendant, may be treated as a promissory note. (*m*) But if it is a mere inchoate instrument, having neither the name of a drawer nor of a payee upon it, it is not a note. (*n*) A promissory note need not contain an express promise in terms upon the face of it; it is sufficient if the promise appears by necessary inference from the words used. (*o*) A note in writing, for example, to the following effect: "I promise to account with A B, or order, for £50, value received by me:" has been held a promissory note negotiable within the statute of Anne. (*p*) And its negotiability is not destroyed by an acknowledgment upon the face of it of a deposit of title-deeds as a collateral security for the payment of the money. (*q*) But it must in all cases, like bills of exchange, be drawn or made for the payment of money by some certain person absolutely and unconditionally. If the promise is in the alternative to pay if somebody else does not, (*r*) or if the payment is to depend upon a contingency or the happening of any uncertain event, or if it is to be made out of a particular fund which may or may not be available, the instrument is not negotiable, and cannot be transferred by indorsement or in any other

(*h*) *Jury v. Barker*, Ell. Bl. & Ell. 459; 27 L. J. Q. B. 255.

(*i*) *Grant v. Vaughan*, 3 Burr. 1527. 204.

(*k*) *Watson v. Evans*, 1 H. & C. 662; 32 L. J. Ex. 137.

(*l*) *Edis v. Bury*, 6 B. & C. 435.

(*m*) *Peto v. Reynolds*, 9 Exch. 415; 23 L. J. Ex. 98; *Fielder v. Marshall*, 9

C. B. N. s. 606; 30 L. J. C. P. 158.

(*n*) *M'Call v. Taylor*, *ante*, p. *752.

(*o*) *Miller v. Thompson*, 4 Sc. N. R.

(*p*) *Morris v. Lee*, 2 Ld. Raym. 1396; 1 Str. 29; 8 Mod. 362.

(*q*) *Wise v. Charlton*, 4 Ad. & E.

(*r*) *Ferris v. Bond*, 4 B. & Ald. 679.

manner. (s) Any words, indeed, upon the face of the note, qualifying the promise and rendering the ultimate liability to pay the money uncertain, will deprive the note of negotiability, and render it a mere agreement. (t)

A promise to pay "as per memorandum of agreement" is not a qualified or conditional promise; (u) nor is a promissory note payable by instalments, subject to a condition that, on default being made in payment of the first instalment, the whole [* 774] amount * should become immediately payable, a note payable upon a contingency, but is, if made payable to order, assignable and indorsable under the statute. (x) But it was essential in all cases to the negotiability of a bill or note, that it be drawn payable "to bearer" or "to order." (y) If those words were omitted, the instrument was formerly not transferable, and the action upon it must have been brought in the name of the original promisee or payee. But if the words "or order" or "or bearer" have been omitted by mistake, they may, after the bill or note has been signed, be inserted with the consent of all parties, in pursuance of an original intention to make the instrument negotiable. (z) If, also, the person to whom, or to whose order, the money is to be paid is uncertain, the instrument is not a promissory note, unless it can be treated as payable to bearer. A promise "to pay the secretary for the time being" of an insurance company, being a "floating contingent promise" to pay some person to be ascertained *ex post facto*, was held not a negotiable promissory note payable to bearer. (a) But this is no longer law (see *ante*, p. * 752). A promise to pay to "the trustees of Wesleyan Chapel, Harrogate, or their treasurer for the time being, £100," was held a good note; for there is no uncertainty as to the payee, as the trustees alone are to be taken as the payees, and the treasurer as their agent only to receive pay-

(s) *Blackenhagen v. Blundell*, 2 B. & Bing. N. C. 251; but see now sect. 8, A. 417; *Hill v. Halford*, 2 B. & P. 413. Act of 1882.

(t) *Robins v. May*, 11 Ad. & E. 213; (z) *Kershaw v. Cox*, 3 Esp. 246.
Clarke v. Percival, 2 B. & Ad. 660. (a) *Storm v. Stirling*, 3 Ell. & Bl.

(u) *Jury v. Barker*, *supra*. 832; 23 L. J. Q. B. 298; *Cowie v. Stirling*, 6 E. & B. 633; 25 L. J. Q. B. 335;
 (z) *Oridge v. Sherborne*, 11 M. & W. 380; *Carlton v. Kenealy*, 12 M. & Enthoven v. Hoyle, 13 C. B. 394; *Yates v. Nash*, 8 C. B. n.s. 581; 29 L. J. C. P. W. 139.

(y) *Plimley v. Westley*, 2 Sc. 423; 2 306.

ment. (b) A note made by several persons, "payable to our and each of our order," is a good promissory note within the statute. (c)

Transfer of Promissory Notes.—If the maker of the note promises to pay the amount of the note to his own order, the note is not a promissory note within the statute until it has been indorsed by the maker; and then it becomes in legal effect, a note payable to bearer, and so falls within the statute. (d) The first transfer of a note payable to order must, as in the case of bills, be made by indorsement and delivery. If such a note is delivered in the first instance without indorsement, the equitable interest only is transferred to the holder; and if the note is indorsed by the maker and not delivered, no right to sue upon the instrument is transferred; and a subsequent delivery by the executor of the maker will not complete the informal transfer, and enable the holder to sue upon the instrument. (e)

*** Liability of the Makers and Indorsers.**¹—The maker [* 775] of a promissory note stands in the same position as the acceptor of a bill of exchange. He is the party primarily liable upon the instrument, and is bound, when the note falls due, to seek out and pay the holder. He is not entitled to presentment, unless the note is payable at or after sight, or is made payable at some particular place. A promissory note, payable on demand, need not be presented to the maker in order to charge him, the commencement of an action against him being a sufficient demand of the money. But in order to charge the indorser, the instrument, whether payable on demand or not, must be duly presented to the maker, and notice of dishonor given (*ante*, pp. * 766, * 767); and if payable on demand, it must be presented within a reasonable time, that is, a period reasonable with respect to the circumstances connected with each particular case. (f)

Indorsement of Notes and Bills overdue.—As a rule of law,

¹ See *ante*, p. * 754.

(b) *Holmes v. Jaques*, L. R. 1 Q. B. 315; *Gay v. Lander*, 17 L. J. C. P. 287; 376; 35 L. J. Q. B. 130. • *Flight v. Maclean*, 16 M. & W. 51; 16

(c) *Absolon v. Marks*, 11 Q. B. 19; L. J. Ex. 23; *Wood v. Myton*, 16 L. J. 17 L. J. Q. B. 7. Q. B. 446.

(d) Sect. 83 (2); *Brown v. De Winton*, 17 L. J. C. P. 285; 6 C. B. 336; (e) *Bromage v. Lloyd*, 1 Exch. 32.

Masters v. Baretto, 8 C. B. 433; *Hooper* India, London, & China v. *Dickson*, L. v. *Williams*, 2 Exch. 20; 17 L. J. Ex. R. 3 P. C. 574. (f)

the indorsee of a bill or note which is overdue must take it on the credit of the indorser, and can stand in no better position. (g) He takes it subject to all its equities. (h) But an original absence of consideration in an accommodation bill does not, it seems, attach to the document, so as to defeat the title of a *bona fide* indorsee for value. (i) In the case of a note payable on demand, the same rule will not hold, at all events where the note or cheque has not been made a very long time, for they are not overdue at any particular date. The question for the jury is whether under all the circumstances the indorsee ought to have been led to inquire into the title of the indorser. (k) A promissory note payable on demand cannot be treated as overdue, so as to affect an indorsee with any equities against the indorser, merely because it is indorsed a number of years after its date, and no interest has been paid on it for several years before such indorsement. (l) Notes payable at and after sight must be presented to the maker before an action can be maintained against him for non-payment. "He is to see the note before he is to be called upon to pay it." (m) When a note is made payable a certain time after sight, the time does not begin to run from the day of the date, but from the day of the note being presented for sight. (n)

[* 776] * **Notes payable at a Particular Place.** — (See now sect. 87, Act of 1882.) Where the place of payment of a note is merely stated in a memorandum at the foot or in the margin of a note, by way of direction or information to the payee, presentment at the place named is not essential; (o) but if any place of payment be mentioned in the body of the note, it is part of the contract, and a presentment at the place indicated must be made. The 1 & 2 Geo. IV. c. 78 (*ante*, p. * 764), did not extend to promissory notes. (p)

(g) *Brown v. Davis*, 3 T. R. 80; (l) *Brooks v. Mitchell*, 9 M. & W. 15.
Barrough v. White, 4 B. & C. 325. (m) *Dixon v. Nuttall*, 1 C. M. & R.

(h) *Sturtevant v. Ford*, 4 M. & Gr. 309.
 101. (n) *Sturdy v. Henderson*, 4 B. & Ald.

(i) *Carruthers v. West*, 11 Q. B. 143; 502.
Ex parte Swan, L. R. 6 Eq. 345; *Sturtevant v. Ford*, *supra*; see *Byles on Bills*, 13th ed. 171. (o) *Price v. Mitchell*, 4 Campb. 200;
Williams v. Waring, 10 B. & C. 2.

(k) *London & County Banking Co. v. Groome*, 8 Q. B. D. 288. See now Trecothick v. Edwin, 1 Stark. 468.
 sect. 86, Act of 1882.

Days of Grace are allowed on promissory notes, (*q*) as well as on bills of exchange (*ante*, p. * 765).

Bills and Notes for the Payment of Sums under £1.—The 26 & 27 Vict. c. 105, sect. 1, repeals the 17 Geo. III. c. 30, and so much of any other act as prohibits, or restrains, or imposes any penalty for, the uttering or negotiating any promissory note (not being a note payable to bearer on demand), bill of exchange, draft, or undertaking in writing, being negotiable or transferable, for the payment of 20s., or above that sum and less than £5, or on which 20s., or above that sum and less than £5, shall remain undischarged, made, drawn, or indorsed in any other manner than as directed by the said act. By the 48 Geo. III. c. 88, sect. 2, notes, and bills for the payment of less than 20s., were made absolutely null and void. But this act is now repealed by the Bills of Exchange Act, 1882; and by the 7 Geo. IV. c. 6, heavy penalties are imposed (sect. 3) (*r*) upon all persons issuing or negotiating promissory notes payable to the bearer on demand for any sum of money less than £5. By the 23 & 24 Vict. c. 111, sect. 19, it was enacted that it should be lawful for any person to draw upon his banker, who should *bona fide* hold money to or for his use, any draft or order for payment to the bearer, or to order on demand, of any sum of money less than 20s. This is also repealed, as now unnecessary. The issue of bank-notes has been subjected to various prohibitions and restrictions by the legislature. (*s*)

Dividend-Warrants¹ issued by the Bank of England for the payment of dividends on stock in the public funds are not negotiable, so as to entitle the holder to demand the dividend; but

¹ As to coupons, see 2 Ames, Bills & N. c. 10, also pp. 843, 844; Bigelow, Bills & N. 13; Daniel, Negot. Instr. c. 47; 2 Pars. Notes & B. 114 n.; Story, Prom. N. 709 n.; U. S. Dig. tit. *Bonds*, sect. 461.

See, further, *First Nat. Bank v. Mount Tabor*, 52 Vt. 87; *Lehman v. Tallassee Manuf. Co.*, 64 Ala. 567; *Perrine v. Thompson*, 17 Blatchf. 18; *Parsons v. Jackson*, 99 U. S. 434; *Hartman v. Greenhow*, 102 U. S. 672; *Williamson v. Massey*, 33 Gratt. 237; *Gray v. State*, 72 Ind. 567; *Wylie v. Speyer*, 62 How. Pr. 107.

(*q*) *Brown v. Harraden*, 4 T. R. 153. Vict. c. 32. These statutes are partially

(*r*) This section is partially repealed; repealed; see St. L. Rev. Acts, 1861, see St. L. Rev. Act, 1873. 1874.

(*s*) 3 & 4 Wm. IV. c. 98; 7 & 8

as there is in general an acknowledgment at the foot of the warrant by the payee of his having received the dividend therein mentioned, it is the custom of the bank to pay the amount to the holder of the warrant and receipt; and these documents are * accordingly transferred from hand to hand, and are generally considered to be negotiable. (t)

Foreign Scrip. — Scrip issued in England by a foreign government entitling the holder to delivery of definitive bonds of the foreign government, and which by the usage of trade is transferred by mere delivery, passes by such delivery to a *bona fide* holder for value without notice that the vendor had no title. (u)

Bankers' Cheques.¹ — A cheque on a banker is a negotiable instrument, payable either to bearer or to order. When it is drawn payable to bearer, it is treated as money or cash, and is transferable from hand to hand, like a bill of exchange, but does not require any acceptance by the banker on whom it is drawn to establish its validity. A person, therefore, who receives a cheque payable to bearer *bona fide* for value, relying on the order of the party making it, is entitled to recover the amount from him, although the cheque has been lost or stolen. (x) A banker's cheque payable to bearer on demand, given on account of a pre-existing debt, and received by the bearer *bona fide*, is indefeasible, although it may have been obtained from the drawer by fraud. (y) In this respect it does not differ from a bill. When it is drawn payable to order, it is a bill of exchange, and negotiable as such when indorsed. (z) The holder cannot sue the banker upon whom it has been drawn, unless the banker has accepted the cheque, or promised to pay it to the holder. The

¹ As to cheques, see 2 Ames, Bills & N. 800, tit. *Cheques*; Bigelow, Bills & N. 15, 60, 115, 156, 167, 240; Daniel, *Negot. Instr.* c. 49; 2 Pars, *Notes & B. c.* 3; Story, *Prom. N. c.* 11; U. S. Dig. tit. *Cheques*; see also article on Rights of cheque-holders, 11 Cent. L. J. 381.

(t) *Partridge v. Bank of England*, 9 Q. B. 424-427.

(u) *Goodwin v. Robarts*, L. R. 10 Ex. 337; Ex. Ch. 1 Ap. Cas. 476; see also *Rumball v. Met. Bank*, 2 Q. B. D. 194.

(x) *Watson v. Russell*, 3 B. & S. 38; 31 L. J. Q. B. 304; 34 ib. 93.

(y) *Currie v. Misa*, L. R. 10 Ex. 153; 1 Ap. Cas. 554.

(z) *Keene v. Beard*, 8 C. B. n. s. 372; 29 L. J. C. P. 287; as to presentment of cheques, see *infra*.

post-dating of a cheque, whether it is payable to order or bearer, does not invalidate the instrument in the hands of a *bona fide* holder for value, with notice that it was post-dated. (a)

Presentment of Cheques for Payment.—(See now sect. 74, Act of 1882.) The holder of a cheque does not lose his remedy against the drawer by reason of non-presentment within any period short of six years after taking it, unless the insolvency of the banker on whom it is drawn has taken place in the interval, or unless there is an actual loss to the drawer by the delay. (b) To guard against loss from the insolvency of the drawee, the holder must present the cheque for payment with reasonable promptitude. If he neglects so to do, and the drawee afterward becomes insolvent or stops payment, the loss will fall upon *the [* 778] holder of the cheque. (cc) If the cheque is presented in due time and refused payment, the loss will fall on the drawer. (c) Sending a cheque by post to the banker on whom it is drawn is generally a good presentment. (d) If the holder of a cheque sends it to his agent for presentment by the post of the day after that on which he has received it, the agent has the following day to present it for payment. (e) If the cheque is delivered to the holder by the drawer after banking hours, and after it has become impossible to pay the cheque to a banker on that day, the delivery will count from the succeeding day; and if the cheque is drawn upon a country bank situate at a distance, such distance must be taken into consideration in determining whether the cheque has been presented within a reasonable time. (f) Presentment through the post-office is generally a proper mode of presentment. (g)

Garnishees had given a judgment debtor a cheque, but upon

(a) *Whistler v. Foster*, 14 C. B. n. s. 248; 32 L. J. C. P. 161; *Austin v. ham*, 16 C. B. n. s. 288; 33 L. J. C. P. 252.

Bunyard, 6 B. & S. 687; 34 L. J. Q. B. 217; *Bull v. O'Sullivan*, L. R. 6 Q. B. 209; 40 L. J. Q. B. 141; *Gatty v. Fry*, 2 Ex. D. 265. (d) *Heywood v. Pickering*, L. R. 9 Q. B. 428.

(e) *Rickford v. Ridge*, 2 Campb. 537; *Hare v. Henty*, 10 C. B. n. s. 65; 30 L. J. C. P. 302; *Prideaux v. Criddle*, L. R. 4 Q. B. 455.

(f) *Bond v. Warden*, 1 Coll. Ch. C. 589.

(g) *Prideaux v. Criddle*, *supra*.

(b) *Robinson v. Hawksford*, 9 Q. B. 52; 15 L. J. Q. B. 377.

(cc) As to measure of loss, see sect. 74, Act of 1882.

(c) *Laws v. Rand*, 3 C. B. n. s. 442; 27 L. J. C. P. 76; *Bailey v. Boden-*

service of the order immediately stopped the cheque at the bank; it was held that the giving of the cheque had not extinguished the debt, which was therefore still capable of being attached. (*h*) As to crossed cheques, see the Crossed Cheques Act, 1876, *ante*, p. * 373, and the Bills of Exchange Act, 1882, sects. 76–82.

A creditor who takes his debtor's agent's cheque on account of the debt, is bound to present it in a reasonable time; and if by his delay he alters the position of the debtor for the worse, the debtor is discharged, notwithstanding he was not a party to the cheque. (*i*)

Summary Remedy for Non-Payment of Bills, Cheques, and Notes.—The 18 & 19 Vict. c. 67 (which no longer applies to the High Court; see R. S. C. 6 a. Or. 2 r. 6, Wilson, 3d ed., p. 186), provides a summary form of proceeding for the recovery of money due on bills, cheques, and notes, which must be commenced within six months after the same shall have become due and payable. It enables the plaintiff to sign final judgment for the principal and interest, if the defendant shall not have obtained leave from a judge to appear and defend the action under the circumstances therein specified and provided for. (*k*) In the case of notes payable on demand, the proceeding must be taken within six months from the date of the note. (*l*)

[* 779] A party * who has obtained leave to defend under this statute is not confined to the defence set up in his affidavit. (*m*)

Cancellation of Bills and Notes.—If the drawer of a cheque or bill tears it up with the intention of destroying it, but does it so imperfectly that the pieces are pasted together again so as to bear no marks of cancellation about them, the drawer will be responsible upon the instrument to a holder for value who has taken it without having any just cause for supposing that it had been cancelled. This has been held to be the case where the appearance of the instrument was consistent with its having been divided into two parts for the purpose of safe transmission

(*h*) *Cohen v. Hale*, 3 Q. B. D. 371.

(*l*) *Maltby v. Murrell*, 29 L. J. Ex.

(*i*) *Hopkins v. Ware*, L. R. 4 Ex. 377; 5 H. & N. 813.

268; 38 L. J. Ex. 147.

(*m*) *Saul v. Jones*, 1 El. & El. 59; 28

(*k*) *Eyre v. Waller*, 5 H. & N. 463; L. J. Q. B. 37.

29 L. J. Ex. 246.

through the post, and where it was believed to have been so divided by the plaintiff, who received it. (*n*)

Proof of Want of Consideration.¹ — A bill or note given in consideration of what is supposed to be a debt, is without consideration, if it appears that there was either a mistake in law (*o*) or in fact (*p*) as to the existence of the debt, and there has been no indorsement or transfer of the instrument for value. But where there is no mistake either in law or in fact, but a claim has been made by the plaintiff on the defendant, to which the defendant thinks he is not liable, but which claim the plaintiff is about to enforce by action, and the parties agree to a compromise, and the defendant gives his promissory note to the plaintiff for the payment of a certain sum, there is a good consideration for the note, and the instrument cannot afterward be avoided on the ground that there was no valid claim against the defendant, and no cause of action against him at the time of the compromise. (*q*) As to the onus of proof of consideration, see *ante*, p. * 757.

Alterations in a Bill or Note avoiding the Contract.² — An alteration of a bill or note in a material particular (see now sect.

¹ See, as to sufficiency of consideration, article on Antecedent indebtedness as a valuable consideration, by O. F. Bump, 12 Cent. L. J. 26; *Wilson v. Hentges*, 26 Minn. 288; *West v. Cavins*, 74 Ind. 265; *Williams v. Pendleton, &c. Turnp. Co.*, 76 Ind. 87; *Dickinson v. Hall*, 14 Pick. 217; note by A. C. Freeman, 25 Am. Dec. 392.

² On the subject of alterations in bills or notes, see 2 Ames, Bills & N. 796, tit. *Alteration*; Bigelow, Bills & N. 573, sect. 3; Daniel, Negot. Instr. c. 43; 2 Pars. Notes & B. c. 15, sects. 4, 5; Story, Prom. N. sect. 371, note; U. S. Dig. tit. *Bills and Notes*, sect. 920.

Recent decisions are *McCauley v. Gordon*, 64 Ga. 221; *Littlefield v. Coombs*, 71 Me. 110; *Reeves v. Pierson*, 23 Hun, 185; *Vaughan v. Fowler*, 14 S. C. 355; *Leonard v. Phillips*, 39 Mich. 182; *Mechanics' Bank v. Valley Packing Co.*, 70 Mo. 643; *Neil v. Case*, 25 Kans. 510; *Hamilton v. Wood*, 70 Ind. 306; *McCoy v. Lockwood*, 71 Ind. 319; *Dietz v. Harder*, 72 Ind. 208; *Wallace v. Wallace*, 8 Ill. App. 69; *Morrison v. Huggins*, 53 Iowa, 76; *State Sav. Bank v. Shaffer*, 9 Neb. 1; *Gorden v. Robertson*, 48 Wis. 493; *Kronskop v. Shontz*, 51 Wis. 204; *Crews v. Farmers' Bank*, 31 Gratt. 348; *Moore v. Hutchinson*, 69 Mo. 429; *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77; see also *Gerrish v. Glines*, 16 Am. L. Reg. n. s. 274; *Low v. Merrill*, 1 Pinn. 340.

(*n*) *Ingham v. Primrose*, 7 C. B. n. s. 82; 28 L. J. C. P. 295. (*p*) *Bell v. Gardner*, 4 M. & Gr. 23.
(*q*) *Cook v. Wright*, 30 L. J. Q. B. 12.
(*o*) *Southall v. Rigg*; *Forman v.* 321; *ante*, p. * 12.
Wright, 11 C. B. 481.

64 of the act), after it has been negotiated, will avoid the contract, such as the addition to a promissory note for the payment of money with lawful interest, of the words "Interest at £6 per cent" written in the corner of the note, without the assent of the maker, after the note had been signed by him; (*r*) the cutting off the signature of one of several joint promisors who have united together in undertaking a joint liability by their joint note of hand; (*s*) the addition to the note of the name of a new promisor without the consent of the defendant; (*t*) the [* 780] acceleration of the *time of payment of a bill of exchange by an alteration in the date of the bill and the time that it has to run, (*u*) or the postponement of the date of payment of a cheque; (*x*) an insertion of an incorrect date, where the bill bore no date upon the face of it; (*y*) an alteration in the place of payment; or an insertion of some particular place of payment, without the privity and assent of the acceptor. (*z*)

Immaterial Alterations.—Whenever the alteration is immaterial, the substance of the contract remaining the same, the contract is not vitiated, although the alteration has been made by the plaintiff himself. (*a*) Where, therefore, the date of a bill payable three months after date was altered from the 2d to the 22d of March, it was held, as between the indorsee and the acceptor, that the alteration was an immaterial alteration, the time of payment not being accelerated. (*b*) Where a promissory note expressed no time for payment, and while it was in the possession of the payee the words "on demand" were added without the assent of the maker, it was held, in an action by the payee against the maker, that, as the alteration only expressed the effect of the note as it originally stood, and was therefore imma-

(*r*) *Warrington v. Early*, 2 Ell. & Bl. 763; 23 L. J. Q. B. 47; and see *Hirschfield v. Smith*, L. R. 1 C. P. 340; 35 L. J. C. P. 177.

(*s*) *Mason v. Bradley*, 11 M. & W. 593.

(*t*) *Gardner v. Walsh*, 5 Ell. & Bl. 91; 24 L. J. Q. B. 285.

(*u*) *Master v. Miller*, 4 T. R. 320; 5 T. R. 367; 1 Smith's L. C. 6th ed. 837; *Hirschman v. Budd*, L. R. 8 Ex. 171; 42 L. J. Ex. 113.

(*x*) *Vane v. Lowther*, 1 Ex. D. 176.

(*y*) *Harrison v. Cotgreave*, 4 C. B. 562.

(*z*) See now sect. 64 of the Act of 1882; *Calvert v. Baker*, 4 M. & W. 417; *Tidmarsh v. Grover*, 1 M. & S. 735; *Deshbrow v. Wetherby*, 1 Mood. & Rob. 438; *Crotty v. Hedges*, 5 Sc. N. R. 221; 4 M. & Gr. 561; *Burchfield v. Moore*, 23 L. J. Q. B. 261.

(*a*) *Aldous v. Cornwell*, *infra*.

(*b*) *Parry v. Nicholson*, 13 M. & W. 778.

terial, it did not affect the validity of the instrument. (c) An alteration or addition, moreover, to the contract, before it has been finally completed, made with the assent of the parties to be affected thereby, will not avoid the instrument, or render a fresh stamp necessary. (d) Where a joint and several promissory note was altered after the first two makers had signed the instrument, but before the defendant had affixed his signature, it was held that the note was not vitiated as regarded the defendant, and that no fresh stamp was requisite. (e) Where a bill was made payable on the 1st of January, and the person to whom it was directed struck out the word January, and inserted March, and then accepted the bill and sent it to the drawer, who, perceiving the enlarged acceptance, struck out March and again inserted January, and at that time sent the bill for payment, which the acceptor refused, whereupon the holder of the bill again struck out January and left the bill payable in March, as the acceptor had accepted it, it was held that the acceptor was responsible for the non-payment of the bill on the 1st of March, pursuant to his original *acceptance. (f) Where the [*781] holder of a bill for value agreed to take a new bill, and a bill at three months was sent him, to which he objected, requiring a bill at two months, and the three was accordingly altered to two, and the bill made payable at two instead of three months, it was held that the alteration did not invalidate the bill. (g)

Whenever the plaintiff has altered a bill or note so as to vitiate the security, and deprive the defendant of a remedy which he would otherwise have had upon the instrument against the parties whose names are upon the face of it, the plaintiff will not only be deprived of all right of action upon the bill, but he will also lose all remedy for the recovery of the debt for which the bill was given. (h) But if the defendant has assented to the alteration, and the security is vitiated for want of a new

(c) *Aldous v. Cornwell*, L. R. 3 Q. B. 573; 37 L. J. Q. B. 201.

(d) *Fitch v. Jones*, 5 Ell. & Bl. 238; 24 L. J. Q. B. 293.

(e) *Wright v. Inshaw*, 1 Dowl. n. s. 802.

(f) *Price v. Shute*, cited 4 T. R. 336.

(g) *Tarleton v. Shingler*, 7 C. B. 812.

(h) *Alderson v. Langdale*, 3 B. & Ad. 660.

stamp, or the bill has been accidentally or ignorantly altered by the plaintiff without any fraudulent intent, and the defendant's remedy against any other parties is not affected by the alteration, the plaintiff's right of action for the recovery of the debt on account of which the bill was given is not discharged. (*i*) Where a sum of £250 had been advanced to a banker upon the security of a promissory note, and the note was subsequently altered by the parties, and vitiated by reason of there being no fresh stamp, it was held that the £250 might be recovered independently of the note, upon a common count for money lent. (*k*) And where the names of prior indorsers of a bill had been struck out by mistake, it was held that the erasure might be corrected. (*l*) It lies upon the party suing upon a bill or note to account for any material alteration appearing upon the face of it, or to give some reasonable evidence from which it may be inferred that the alteration was not made under such circumstances as would avoid the instrument, or render a fresh stamp necessary, (*m*) unless the making of the bill, as set out by the plaintiff, is admitted on the record, the defendant merely denying the indorsement to the plaintiff, (*n*) or the alteration is immaterial, and does not affect the plaintiff's right of action. (*o*)

If a bill of exchange or note is altered in any material particular, and the alteration is apparent (see sect. 64, *supra*, p. * 780), the remedy of the *bona fide* holder for value [* 782] is confined * to a right to recover the consideration for the bill as between himself and the party from whom he received it. A similar remedy may be resorted to by each indorsee against his immediate indorser, till the party is reached through whose fraud or laches the alteration was made; and the loss must rest with him, as it was his duty to have preserved the instrument in its original state. (*p*)

(*i*) *Atkinson v. Hawdon*, 2 Ad. & E. 628; *Sloman v. Cox*, 1 C. M. & R. 471.

(*k*) *Sutton v. Toomer*, 7 B. & C. 416.

(*l*) *Wilkinson v. Johnston*, 5 D. & R. 412.

(*m*) *Knight v. Clements*, 8 Ad. & E. 215; *Henman v. Dickinson*, 5 Bing. 183; 2 M. & P. 289; *Clifford v. Parker*, 3 Sc.

N. R. 238; *Cariss v. Tattersall*, ib. 257.

(*n*) *Sibley v. Fisher*, 7 Ad. & E. 446.

(*o*) *Earl of Falmouth v. Roberts*, 9 M. & W. 469. And even where the alteration is material, a written contract may be looked at to see the terms of a parol contract. *Pattinson v. Luckly*, *post*, p. * 1238.

(*p*) *Burchfield v. Moore*, 3 Ell. & Bl. 687; 23 L. J. Q. B. 263.

Loss of Bills and Notes. — By the 17 & 18 Vict. c. 125, sect. 87, which is reproduced by sect. 70, Act of 1882, it is enacted that, in actions founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court, or a judge, to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the court or judge, or a master, against the claims of any other person upon such negotiable instrument. (*q*) If the bill or note was not originally negotiable, that is, payable to bearer or to order, the loss of it is no defence to an action upon the instrument. (*r*) But if a negotiable bill or note has been lost, the loss, if permitted to be set up, is an answer as well to an action upon the instrument as for the recovery of the debt for which it was given. (*s*)

Damages recoverable on the Dishonor of Bills. — Where an action is brought by the holder of a bill of exchange, not being an accommodation bill, against the acceptor, and there has been a partial payment by the drawer of the amount due on the bill, the holder may nevertheless recover the whole amount of the bill from such acceptor; but he holds the difference between the amount of the bill and the total amount received from the acceptor and the drawer together, as a trustee for the drawer. If the bill is an accommodation bill, the holder can only recover from the acceptor the amount due, after giving credit for the payment. (*t*) When a bill drawn and indorsed in England, and payable abroad, is dishonored by the acceptor's non-payment, the holder is entitled to recover from the indorser the amount of the re-exchange, and not the amount he gave for the bill in England. (*u*)

Damages for not meeting Bills at Maturity. — Where defendants, a banking company, had, under a special agreement, accepted the plaintiff's bills, but their bank broke before the bills arrived at maturity, and the plaintiffs arranged with another house to take up the bills, and paid commission, and also

(*q*) *Noble v. The Bank of England*, 2 H. & C. 355. 95; *Crowe v. Clay*, 9 Exch. 608; 23 L. J. Ex. 150.

(*r*) *Charnley v. Grundy*, 14 C. B. 614; 23 L. J. C. P. 121. (*t*) *Cook v. Lister*, *ante*, p. *772.

(*u*) *Suse v. Pompe*, 30 L. J. C. P. 75;

(*s*) *Hansard v. Robinson*, 7 B. & C. 133. *Willans v. Ayers*, 3 Ap. Cas. 133.

[* 783] paid * the expenses of protesting the bills and of telegraphing, it was held that, although as a general rule in an action on a bill of exchange by an indorsee against the acceptor neither general nor special damages can be recovered, yet, under the above circumstances, the commission and other expenses were recoverable, as the reasonable and natural consequences of the defendants' breach of contract. (x)

Specific Appropriation of Securities.¹—Securities held by an acceptor against his acceptances are available to the bill-holders if both drawer and acceptor become insolvent, on the ground that the equity of the drawer to the surplus produce of the securities after answering the demand upon them can only be accomplished by first satisfying the amount due on the bills. (y) There must not only be an insolvency, but both estates must be in a course of judicial administration, (z) and the mere fact that the acceptor or drawer, a joint-stock company, has been ordered to be wound up, is not sufficient proof of insolvency. (a)

Where only one of the parties is within the jurisdiction of the court, and the other is not, the latter is still free to dispose of his property as he sees fit, and he may object to his property being appropriated in a particular manner, and may recall a previous direction respecting it. (b)

In a transaction between principal and agent, a direction given by the principal to the agent as to the application of the proceeds of the sale of particular goods is binding on the agent, and he cannot set up a general lien against such direction. (c) But as between vendor and purchaser, where bills are drawn by the vendor upon the purchaser, with directions to place them to the account of the shipment of goods, and the bills of lading are

¹ Sheldon, Subrogation (1882), is the best general work on the subject; see specially c. 5. See, further, U. S. Dig. tit. *Debtor and Creditor*, sects. 605-662; ib. tit. *Principal and Surety*, sects. 623-684; Ann. Dig. 1870-1878, tit. *Debtor and Creditor*; ib. tit. *Principal and Surety*; Ann. Dig. 1879, &c. tit. *Subrogation*.

(x) *Prehn v. Royal Bank of Liverpool*, L. R. 5 Ex. 92; 39 L. J. Ex. 41.

(y) *Ex parte Waring*, 19 Ves. 345; see *Banner v. Johnson*, L. R. 5 H. L. 157; *Ex parte Mann*, 5 Ch. D. 367; as to what amounts to a specific appropriation, see *Ex parte Banner*, 2 Ch. D. 278.

(z) *Ex parte General South American Co.*, L. R. 10 Ch. 635.

(a) *Hickie & Co.'s Case*, L. R. 4 Eq. 226.

(b) *Ex parte General South American Co.*, *supra*.

(c) *Frith v. Forbes*, 4 D. F. & J. 409.

handed to the purchaser, there is no specific appropriation, but the goods pass by the bills of lading. (*d*)

If the securities are not realized until after the bill-holder has proved against the estate, his proof must be reduced by the amount received from the securities, and any dividend received on the excess of the original over the reduced proof must be refunded. (*e*)

Merchants frequently give directions that a bill given by them shall be provided for by a certain specified cargo by a certain ship, an agreement which is not in itself an equitable lien, but * may be part of the evidence tending to show [* 784] an intention to create one. So where the consignor had drawn bills in favor of Frith & Co., and wrote to the consignees about these bills in a manner showing an intention to give Frith & Co. an equitable interest in the cargo referred to, it was held that the cargo was effectually appropriated to meet the bills, and that Frith & Co. had a lien upon it in priority to the consignees' claim for the balance due to their general account as consignees. (*f*)

But where the consignor and consignee were part owners of a cargo, and the consignor drew bills to his own order against the cargo, and indorsed them to the plaintiffs, who knew nothing about any letters giving them any lien, and the plaintiffs claimed a lien, it was held that they had no lien in priority to the consignee's general account. The mere fact that there appear upon a bill the words "which please place to cargo per A," does not give the bill-holder a lien upon that cargo. (*g*)

Parties to Bills — Agents. — When the drawee is requested to pay a certain sum of money "on behalf" or "on account" of a named third party, and the drawee accepts in his own name on behalf of such third party, and the surrounding circumstances show that he had authority so to accept, and that he has bound such third party by his acceptance, he will not himself be per-

(*d*) *In re Entwistle*, 3 Ch. D. 477. 409; *Ranken v. Alfaro*, 5 Ch. D. 786,

(*e*) *In re Barned's Banking Co.*; *Ex parte Joint Stock Discount Co.*, L. R. 10 C. A. (*g*) *Roey & Co. v. Ollier*, L. R. 7 Ch. Ch. 198. 695.

(*f*) *Frith v. Forbes*, 4 D. F. & J.

sonally liable upon his acceptance; (*h*) but if the bill is drawn upon him without qualification, and he accepts in his own name, he cannot exempt himself from the ordinary liability of an acceptor by saying that he accepts on behalf of some third party on whom the bill is not drawn. (*i*) If a bill of exchange is addressed to several persons, and one of them alone accepts it, he is personally responsible upon the bill. (*l*) Where a bill upon the face of it purports to be accepted "per procuration," that circumstance is a notice to whoever takes the bill that it has been accepted by an agent acting under an authority given to him by a principal; and the holder cannot maintain an action against the principal, if the authority has been exceeded. (*m*)

Promissory Notes by Trustees, Agents, &c. — (See sects. 26 and 89, Act of 1882.) If a party signs a promissory note whereby he promises in his own name to pay a sum of money on behalf of a third party, he will himself be personally responsible for the payment of the money, (*n*) unless it *plainly appears from the surrounding circumstances that he contracted as agent, and bound his principal by the contract. (*o*) Parties who promise in their own names to pay money cannot exonerate themselves from personal liability by describing themselves as "trustees," "treasurers," "directors," or "secretaries" of a named charity, company, or association, (*p*) or as "executors." (*q*) But if the promise is, on the face of the note, expressed to be made by a principal, and the party whose signature is attached to it signs the name of the principal to the instrument, adding his own name only as agent, he will, as we have seen, incur no personal liability upon the note, provided he was duly authorized to act in the matter. (*r*)

- (*h*) *Leadbitter v. Farrow*, *ante*, p. * 66. 25 L. J. Ex. 348; *Lindus v. Melrose*, 3 H. & N. 137; 27 L. J. Ex. 327.
 (*i*) *Mare v. Charles*, 5 Ell. & Bl. 981; 25 L. J. Q. B. 119; *Nichols v. Diamond*, 9 Exch. 157; *ante*, p. * 66. (*p*) *Price v. Taylor*, 5 H. & N. 540; *Bottomley v. Fisher*, 1 H. & C. 211; 31 L. J. Ex. 417; *Dutton v. Marsh*, L. R. 6 Q. B. 361; 40 L. J. Q. B. 175.
 (*l*) *Owen v. Van Ulster*, 10 C. B. 318. (*q*) *Childs v. Monins*, 5 Moo. 282.
 (*m*) *Stagg v. Elliott*, 12 C. B. N. S. 373; 31 L. J. C. P. 260; *Eyre v. McDowell*, 14 Ir. C. L. R. 314. (*r*) *Buckley, Ex parte*, 14 M. & W. 469; *Alexander v. Sizer*, L. R. 4 Ex. 102; 38 L. J. Ex. 59; *ante*, pp. * 63-
 (*n*) *Healey v. Story*, 3 Exch. 3; 18 L. J. Ex. 8; *ante*, p. * 66. * 67.
 (*o*) *Agg v. Nicholson*, 1 H. & N. 165;

Bills of Exchange and Promissory Notes by Partners.—

(See sect. 23, Act of 1882.) A partner in a mercantile or trading firm may draw, accept, or indorse bills of exchange and promissory notes in the trading name of the firm so as to bind the partnership, because the drawing, accepting, and negotiating bills and notes are usual and necessary for the purpose of carrying on the trade and business of a mercantile firm. But it is not every partnership which gives such an authority. Solicitors and professional men in partnership have no such power; nor have brokers who are in partnership for the mere purpose of obtaining orders on commission and dividing the expenses. (s) Every one of the partners in a mercantile firm is liable upon such bills or notes, whether his individual name is or is not used in the collective name of the firm, and whether it does or does not appear upon the face of the instrument, and whether such partner is dormant and secret, or a known and active member of the co-partnership, and whether the proceeds of such bill or note are dedicated and applied to partnership purposes, or to the private use of the individual partner. (t) Where one of the acting partners of a firm accepted a bill in the name of the firm to obtain a loan, and then applied the money to his own private use, it was held that a secret partner, not known at the time of the acceptance to be a partner in the firm, might be sued upon the bill. (u) And where a bill was indorsed by a partner in the trading name of the firm, it was held that a person not known to be a partner at the time of the indorsement might be sued upon the instrument. (x) "There * may be partner- [* 786] ships," observes Lord Ellenborough, "where none of the existing partners have their names in the firm. Third persons may not know who they are; and yet they are all bound by the acts of any partners in the name of the firm or partnership." (y) But if the taker or holder thereof knew at the time he received the bill or note that the transaction was not a partnership trans-

(s) *Yates v. Dalton*, 28 L. J. Ex. 69; (u) *Wintle v. Crowther*, 1 Cr. & J. Forster v. Mackreth, L. R. 2 Ex. 162. 316.

(t) *Lloyd v. Ashby*, 2 B. & Ad. 23; (x) *Vere v. Ashby*, 10 B. & C. 288.

Brown v. Kidger, 3 H. & N. 858. (y) *Swan v. Steele*, 7 East, 213; *Thicknesse v. Bromilow*, 2 Cr. & J. 425.

action, but the private affair and dealing of the single partner, the other members of the firm will not be liable thereon. The bill or note must, in order to bind the partnership, be made, accepted, or indorsed in the trading name of the firm, or in some adopted name, recognized and used by the partnership in its ordinary course of business; or if made, accepted, or indorsed by the one partner in his own name, the drawing, acceptance, or indorsement must be expressed to be made by him for and as the act of the firm at large. (z) Where a signature to a bill is common to an individual partner and to the firm, a *bona fide* holder for value without notice has not the option to sue either the individual or the firm. The presumption is that the bill was given for the firm. But this may be rebutted; and if so it is immaterial that the holder took it as the bill of the firm. (a) Where a member of a firm has no authority to bind his partners by drawing or accepting bills, he cannot bind them by giving a post-dated cheque. (b)

Where a bill of exchange was drawn upon a firm and accepted by one of the partners in his own name, it was held that he must be understood to exercise his power to bind his co-partners, and to accept the bill according to the terms in which it is drawn. (c) Thus where a bill of exchange was addressed to "James Masterman & Co.," and was accepted by James Masterman only, without the words "& Co.," it was held that the acceptance was the acceptance of the firm, and that all the partners were liable upon it. (d) If, however, the bill or note is drawn, or made, or accepted, or indorsed by the one partner in his own name only, without mention of the partnership, and without its being expressed on the face of the instrument that the drawing or making, acceptance or indorsement, is made or done for the firm, the one partner whose name appears upon the instrument is the only person who can be sued thereon, although the proceeds thereof have been applied to the joint purposes of

(z) *Smith v. Jarves*, 2 Raym. 1484; (b) *Forster v. Mackreth*, L. R. 2 Ex. Galway v. Matthew, 1 Campb. 402; 162.

Hall v. Smith, 1 B. & C. 407.

(c) *Mason v. Rumsey*, 1 Campb. 385;

(a) *Yorks. Banking Co. v. Beatson*, but see now sect. 73, Act of 1882.

5 C. P. D. 109, C. A.

(d) *Wells v. Masterman*, 2 Esp. 730.

the firm, unless the partnership has been in the habit of paying bills and notes so *made and negotiated, and [*787] has consequently adopted the name of the partner as the name of the firm in bill transactions. (e) If the firm carries on business in the name of an individual partner, his acceptance or indorsement will be treated as the acceptance or indorsement of the firm, and all the partners, consequently, will be liable upon the instrument. (f) The plaintiff pressed C, his partner, for payment of a debt, and C gave him two bills purporting to be accepted by the defendant's firm, and the plaintiff at first believed they were so accepted,—in fact one partner had accepted without the authority of the other. There was no drawer's name, and the plaintiff, subsequently knowing something was wrong, and therefore knowing that he had no authority, filled in the name of his own firm. It was held he could not recover on the bills against the partner who had not authorized the acceptance. (g)

A partnership may have divers trading names, by the use of any one of which by one of the partners it may be bound. If a firm has been in the habit of paying bills and notes, made, accepted, or indorsed in a name which is not the ordinary trading name of the co-partnership, it will be deemed to have given an implied authority to such partner to use such name, as the name of the firm, in bill transactions, and will be as much bound thereby as if the ordinary trading name of the firm had been made use of. (h) If a dormant or secret partner has contracted in the name of the firm, or in an adopted name, he may be sued in his real name. (i) When any one of the partners has accepted a bill of exchange, or indorsed a promissory note, in a name differing from the ordinary trading name of the firm, the proper question for the jury is whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the acceptor or indorser must be taken to have accepted

(e) *Emly v. Lye*, 15 East, 7.

(h) *Williamson v. Johnson*, 1 B. &

(f) *South Carolina Bank v. Case*, 8 C. 146.

B. & C. 436; and see *Stephens v. Reynolds*, 5 H. & N. 513; 29 L. J. Ex. 278.

(i) *Ball v. Gordon*, 9 M. & W. 345,

(g) *Hogarth v. Latham*, 3 Q. B. D. 643.

or issued the bill or note on his own account, and not in the exercise of his general authority as a partner. (*k*)

Bills and Notes by Trustees or Directors of Co-Partnerships. — In order to render the shareholders or co-partners liable upon bills of exchange or promissory notes, accepted, made, or indorsed by the trustees or directors in the trading name [* 788] of the * co-partnership, it must be made out affirmatively by the parties suing upon such bills or notes that the directors had either an express or an implied authority to bind the other members by drawing, accepting, or making, or indorsing bills and notes, either by showing that companies instituted for similar purposes have constantly been in the habit of vesting such a power in the hands of their directors, or that it was absolutely necessary for the purpose of carrying on the concern that such a power should be placed in their hands. (*l*) If the directors are authorized to issue bills, they must be drawn in conformity with mercantile custom and usage. (*m*)

Bills and Notes by Corporations. — (See sects. 22 and 91, Act of 1882.) When a corporation is established for trading purposes, it is from its nature capable of drawing a bill of exchange, and making the promise implied by law from making a bill, and is liable to be sued on the bill. (*n*)

Bills of Exchange and Promissory Notes by Registered Companies. — By the 25 & 26 Vict. c. 89, sect. 47, it is enacted that a promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of the company, if it has been made, accepted, or indorsed in the name of, or by, or on behalf, or on account of, the company by any person acting under the express or implied authority of the company. This section does not confer on all companies registered under the act the power of issuing bills of exchange, such a power only existing where, upon a fair construction of the memorandum and articles of association, it appears that it was intended to be

(*k*) *Faith v. Richmond*, 11 Ad. & E. 137; *Steele v. Harmer*, 14 M. & W. 339; *Kirk v. Blurton*, 9 M. & W. 289; 831.

Norton v. Seymour, 3 C. B. 792; (*m*) *State Fire Ins. Co.*, 32 L. J. Ch. Stephens v. Reynolds, 5 H. & N. 517; 300.
29 L. J. Ex. 278.

(*n*) *Murray v. East India Co.*, 5 B. & Ald. 204.

(*l*) *Dickinson v. Valpy*, 10 B. & C. & Ald. 204.

conferred (o) A promise by directors in their own names on behalf of the company will be binding on the company under this section, and will not, if the directors were duly authorized to make the promise, render them personally responsible. (p) But if any director, manager, or officer of any registered limited company, or any person on its behalf, signs, or authorizes to be signed, on behalf of such company, any bill of exchange, promissory note, indorsement, cheque, or order for money or goods, or issues, or authorizes to be issued, any bill of parcels, invoice, receipt, or letter of credit of the company, wherein the name of the company is not mentioned with the word "limited" after it, he is (sect. 42) personally * liable to the holder [* 789] of the bill, &c., for the amount thereof, unless the same is duly paid by the company. (q) If the directors are by the deed of settlement or articles of association absolutely prohibited from borrowing money or issuing bills of exchange or promissory notes, the company cannot be made responsible upon bills or notes issued in defiance of the prohibition, (r) unless the shareholders acquiesce in the proceeding, and do not call the directors to account. (s) If bills or notes issued by directors in their own names on behalf of the company are drawn or made without authority, or are informally drawn, and are not, consequently, binding upon the company, the parties who have signed them will themselves be responsible upon them. (t) When the directors are expressly authorized to accept bills or issue promissory notes on behalf of the company, the company will be bound if the authority is substantially acted upon. It need not be exercised in the very terms in which it is given, or be strictly or technically accurate in point of form; (u) and if there has been

(o) *Peruvian Ry. Co. v. Thames & Mersey Marine Ins. Co.*, L. R. 2 Ch. 617; 36 L. J. Ch. 864.

(p) *Lindus v. Melrose*, 3 H. & N. 177; 27 L. J. Ex. 327; *Aggs v. Nicholson*, 1 H. & N. 165; 25 L. J. Ex. 348; *Forbes v. Marshall*, 11 Exch. 174; *Halford v. Cameron's, &c.*, 16 Q. B. 444; 20 L. J. Q. B. 160; *Edwards v. Cameron's, &c.*, 6 Exch. 269; *Alexander v. Sizer*, L. R. 4 Ex. 102; 38 L. J. Ex. 59.

(q) *Penrose v. Martyn*, 28 L. J. Q. B.

28; Ell. Bl. & Ell. 499.

(r) *Balfour v. Ernest*, 5 C. B. x. s.

601; 28 L. J. C. P. 170.

(s) *Martin, B., Forbes v. Marshall*,

11 Exch. 179.

(t) *Penkivil v. Connell*, 5 Exch. 381;

Dutton v. Marsh, L. R. 6 Q. B. 361; 40

L. J. Q. B. 175.

(u) *Thompson v. Wesleyan Newspaper, &c.*, 8 C. B. 861; *Land Credit*

a plain departure from the terms of the authority, and the shareholders have acquiesced in it, the company will be bound. (x) A proviso in a bill of exchange drawn by a joint-stock company limiting the liability thereunder, is repugnant and void. (y) Where a company is being voluntarily wound up, and there are four liquidators, one of them cannot, in the absence of any authority from the company, and solely upon the strength of a general resolution of his co-liquidators, accept bills on behalf of the company. (z) The contract which a party transferring for value the property in a bill of exchange makes with the transferee is that he warrants that the bill, having been accepted by the drawee, shall, on being presented at the time it becomes due, be paid, — that is, he engages as surety for the due performance by the acceptor of the obligations which the latter takes upon himself by the acceptance. The liability of the transferor, therefore, is to be measured by that of the acceptor whose surety he is; and as the obligations of the acceptor are to be determined by the *lex loci* of performance, so also must [* 790] be the obligations of the surety. (a) * Where a bill payable in a foreign country is drawn and indorsed in this country, the sufficiency of the notice of dishonor depends on the law of the place of payment. (b)

Conversion of Bills and Notes. — A man who holds a bill of exchange for a particular purpose has no right, without authority, to go and receive money on the bill, and if he does so, he is responsible for a conversion of the instrument. (c) If, therefore, a bill of exchange or negotiable security is delivered into the hands of an agent or mandatory, that he may get it discounted, and he neglects to do so, and pays away the bill or note in

Company of Ireland, *In re*, L. R. 4 Ch. 460; 40 L. J. Ch. 341.

(x) *Allen v. Sea, &c. Co.*, 9 C. B. 578; 19 L. J. C. P. 305.

(y) *State Fire Ins. Co., In re, ex parte Meredith*, 32 L. J. Ch. 300.

(z) *London & Mediterranean Bank, In re*, L. R. 5 Ch. 567; 40 L. J. Ch. 26; *Re London & Mediterranean Bank, ex parte Birmingham Banking Co.*, L. R. 3 Ch. 651; 36 L. J. Ch. 807; *London &*

Mediterranean Bank, In re, ex parte Agra & Masterman's Bk., L. R. 6 Ch.

206.

(a) *Rouquette v. Overmann*, L. R. 10 Q. B. 525.

(b) *Rothschild v. Currie*, 1 Q. B. 43; *Hirschfield v. Smith*, L. R. 1 C. P. 340; *Horne v. Rouquette*, 3 Q. B. D. 514, C. A.

(c) *Alsager v. Close*, 10 M. & W. 583.

furtherance of his own purposes, he is responsible for a conversion of the security; (*d*) but if he pursues the authority given him, and gets the bill discounted, but misapplies the proceeds, he is not responsible for the conversion of the security, but for the misapplication of the money. (*e*)

Conversion of Lost or Stolen Bank-Notes or Negotiable Securities. — If a bill of exchange, bank-note, or promissory note is lost, and the finder refuses to deliver the instrument to the owner on demand, he is guilty of a conversion of it, and is responsible in damages to the extent of the full value of the security. If the instrument is payable to bearer, and the finder, before any demand is made upon him, delivers the note to another, he is exempt from all farther responsibility in respect of it. (*f*) If the person to whom it is transferred took the note with knowledge of the infirmity of the title of the person from whom he received it, (*g*) or if it is transferred to him for the mere purpose of enabling him to sue upon it, and he has given no value for the instrument, he will have no better title than the person from whom he has received it, (*h*) and will be responsible for a conversion if he fails to deliver it up to the owner on demand. But if he is a *bona fide* holder for value, and took and discounted the note without any knowledge that the person from whom he received it had no title to it, he becomes the lawful owner of the instrument, and may retain it or pay it away. (*i*) If he has given full value for the instrument, that is in general conclusive evidence of *bona fides*. If, on the other hand, he has paid a small sum for a bank-note of large value, payable on demand, that would be evidence the other way. (*k*) The whole burthen of impeaching the title of the holder of the instrument falls upon the plaintiff who disputes that title. (*l*) It is not enough for him to show

(*d*) *Cranch v. White*, 1 B. N. C. 414; *Smith's L. C.* 6th ed. 468; *Grant v. Atkins v. Owen*, 4 Ad. & E. 819. *Vaughan*, 3 Burr. 1524; *Lawson v.*

(*e*) *Palmer v. Jarmain*, 2 M. & W. 282. *Weston*, 4 Esp. 57.

(*f*) *Canot v. Hughes*, 2 Bing. N. C. (*k*) *Raphael v. Bank of England*, 17 448. See Add. on Torts (5th ed., by C. B. 173.

Cave), p. 466.

(*g*) *Burn v. Morris*, 2 Cr. & M. 579. (*l*) *Worc. Co. Bank v. Dorch. &*

(*h*) *Bailey v. Bidwell*, 13 M. & W. 73. *Milt. Bank*, 10 Cush. 489; *Wyer v.*

(*i*) *Miller v. Race*, 1 Burr. 452; 1 *Dorch., &c. Bank*, 11 Cush. 51; see

sect. 30 of the act.

that he lost the instrument, or that it has been stolen from him, and that immediately after the loss or the robbery it was found to be in possession of the defendant. (*m*) The latter is not bound, from proof of those circumstances alone, to account for his possession of the security. (*n*) But if the note is one of unusual value, and is found in the possession of the defendant immediately after the loss, and he declines to say from whom he received it, or to give reasonable information of the circumstances under which he became possessed of it, he would be required to prove that he gave value for the instrument; (*o*) and if it was payable to bearer on demand, and he gave much less than its real value, and took it from a total stranger without making any inquiry, and under circumstances which ought to have aroused suspicion in the mind of any prudent person, this will be evidence to show that he took it with knowledge of the infirmity of the title of the person from whom he received it, and to fix him with that infirmity of title. Gross negligence and want of caution are not in themselves sufficient to defeat the title of the holder, where he has given value for the security; (*p*) but gross negligence may be evidence of *mala fides*, though it is not the same thing. (*q*) With respect to crossed cheques, it is enacted by the Crossed Cheques Act, 1876, (*r*) sect. 12, that a person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable," shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had.

In the case of stolen notes, if the possession is recent, and the surrounding circumstances such as to show that the defendant stole the note, or received it into his possession knowing it to have been stolen, the plaintiff cannot maintain his action unless he has prosecuted for the felony. In all cases he should use diligence to apprise the public of his loss. (*s*)

(*m*) *Miller v. Race*, *supra*.

(*n*) *King v. Milson*, 2 Campb. 5.

(*o*) *Bailey v. Bidwell*, 13 M. & W. 76.

(*p*) *Bayley, J., Backhouse v. Harrison*, 5 B. & Ad. 1105; *Raphael v. Bank of England*, 17 C. B. 161, overruling *Snow v. Leatham*, 2 C. & P. 317; *Snow v. Peacock*, 11 Moore, 286; 3 Bing. 406,

and *Easley v. Crockford*, 3 M. & Sc. 701; 10 Bing. 243.

(*q*) *Goodman v. Harvey*, 4 Ad. & E. 876; *Arbouin v. Anderson*, 1 Q. B. 504.

(*r*) See *ante*, p. * 373.

(*s*) *Beckwith v. Corral*, 11 Moore, 337; 3 Bing. 444.

* CHAPTER VI.

[* 792]

CONTRACTS OF ASSOCIATION.

SECTION I.

CONTRACTS OF PARTNERSHIP.

Participation in Profits constituting a Partnership.¹—Any number of persons, not exceeding ten in the case of a bank, or twenty in other cases, (a) may constitute themselves partners by associating together and contributing, in equal or unequal proportions, money, labor, skill, care, attendance, or services, to be employed in lawful commerce or business, upon the express or implied understanding that they are to share in certain proportions the profit and loss of the transaction. (b)⁹⁸ Where there is a community of profits in a definite proportion, the fair inference is

¹ On the whole subject of partnership. see Fox, Dig. Partn. (1872); Pars. Partn. (3d ed. 1878); Story, Partn. (7th ed. 1881); Tyler, Partn. (1878); U.S. Dig. tit. *Partnership*; see also *ante*, p. * 76, American note; article on Limited partnership, 15 Cent. L. J. 442, 462; articles, *ib.* 222, 302; and 38 Am. Dec. 481, note; Uhl v. Harvey, 21 Am. L. Reg. n. s. 118, and note.

(a) 25 & 26 Vict. c. 89, sect. 4. "No company, association, or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking, unless it is registered as a company under this act, or is formed in pursuance of some other act of parliament, or of letters patent; and no company, association, or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business which has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof [Sykes v. Beadon, 11 Ch. D. 170; disapproved of in Smith v. Anderson, 15 Ch. D. 247; but see *In re Padstow Total Loss Ass.*, 20 Ch. D. 137; Jennings v. Hammond, 9 Q. B. D. 225], unless it is registered as a company under this act, or is formed in pursuance of some other act of parliament or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries."

(b) "Contractus societatis est, quo duo pluresve inter se pecuniam, res, aut operas conferunt, eo fine, ut quod inde redditus lucri inter singulos pro rata dividatur." — PUFF. *Lex. Nat.* 1, 5, c. 8, sect. 1.

⁹⁸ See Appendix, Vol. III.

that the losses are to be shared in the same proportion. (c) The contract is founded on the consent of the parties, and may be created and established by their acts and deeds, and their common participation in the profit and loss of a trade or business, or of a particular speculation or adventure, as well as through the medium of an express contract of co-partnership. If one man joins another in the furtherance of a particular undertaking, and contributes work and labor, services and skill, towards the attainment of the common object, upon the understanding that the remuneration is to depend upon the realization [* 793] * of profits, so that if the business is a losing business he is to get nothing, he stands in the position of a partner in the undertaking, and not in that of a laborer or servant for hire. (d)

Participation in Profits not making the Participators Partners.

— A person who merely receives out of the profits the wages of labor, or a commission as a hired servant or agent, such as a factor, foreman, clerk, or manager, and who has no interest or property in the capital stock of the business, is not a partner in the concern, although his wages may be calculated according to a fluctuating standard, and may rise and fall with the accruing profits. (e) Thus the captain of a vessel who has no interest in the ship or cargo is not a partner with the joint adventurers in the profit and loss of the voyage, although his wages are proportioned to the amount of profit realized. (f) Where the owner of a colliery employed a man as captain of one of his barges to carry out and sell coal, and allowed him two thirds of the price for which he sold the coal, after deducting the price charged at the colliery and the wages and pay of the crew, it was held that, as the captain had no interest or right of property either in the boat or the coal, he was merely a servant of the owner, and not a partner with him in the coal trade. (g) So

(c) *In re Albion Life Assurance Soc.*, 16 Ch. D. 87, *per* Jessel, M. R.

(d) *Green v. Beesley*, 2 Sc. 169; 2 Bing. N. C. 108; *Barry v. Nesham*, 16 L. J. C. P. 21; 3 C. B. 641; *Moore v. Davis*, 11 Ch. D. 261.

(e) 28 & 29 Vict. c. 86, sect. 2.

(f) *Pott v. Eyton*, 3 C. B. 32; 15 L. J. C. P. 257; *Andrews v. Pugh*, 24 L. J. Ch. 58; *Dry v. Boswell*, 1 Campb. 329; *Mair v. Glennie*, 4 M. & S. 244; *Harrington v. Churchward*, 29 L. J. Ch. 521.

(g) *Hartley's Case*, Russ. & Ry. 141;

where an apothecary assigned his business on the terms that he was to continue to reside on the premises and attend to the practice, and receive one moiety of the clear profits of the business at the expiration of the year, it was held that this did not create a partnership during the year between the parties, but that it was merely a mode of paying the plaintiff for his services. (*h*) So in the French law, when a merchant, instead of a fixed salary, agrees to give his agent a certain proportion of the profits, the agent is not considered, on that account, to be a partner with the merchant; and when one person consigns goods to another to be sold, under an agreement that the consignee shall have a certain portion of the proceeds of the sale, the consignee is not, on that account alone, to be considered a partner. (*i*) So when persons unite together for the purpose of carrying on a common undertaking, and some of them find the money, stock, and equipments necessary to carry it on, whilst others merely contribute labor in *return for a share in the [* 794] gross earnings, there is no partnership as between the mere laborers in the undertaking. (*k*) Where R resided with his father and assisted him in his business for several years, and the signboard, the invoices, and the banking account were in the name of "R & Son," and they drew and accepted bills under the same title, and executed a deed which described them as co-partners, it was held, nevertheless, after the death of the son, that they were not partners *inter se*. The circumstances relied on in coming to that conclusion were the absence of any division of profits in the books, which were kept by the son; the absence of proof of the son's having any capital, or being entitled to receive any share of the profits; the fact of his having, when he ceased to reside with his father, made no request for an account of the profits, but accepted £1 a week as a remuneration until his death six months afterward; and the testimony of the members of the family. (*l*)

Reg. v. Wortley, 15 Jur. 1137; Stocker 969; Duvergier, Droit Civ. tom. 5, Nos. 48, 56.
v. Brockelbank, 20 L. J. Ch. 401; Hes-

keth v. Blanchard, 4 East, 144.

(*h*) Rawlinson v. Clarke, 15 L. J. Ex. 171; 15 M. & W. 292.

(*k*) Wilkinson v. Fraser, 4 Esp. 181.

(*l*) Radcliffe v. Rushworth, 33 Beav. 484.

(*i*) Pardessus, Droit Commercial, No.

Joint Purchases of Goods. — If several persons join together in making a purchase of goods, they do not by so doing constitute themselves partners, unless they are jointly concerned in the subsequent disposal of such goods. If, for example, four persons agree to purchase a pipe of Madeira, and afterward to divide it amongst them for their own separate use and consumption, they do not, in contemplation of law, become partners in the transaction *inter se*, although they are part owners of the wine when purchased, and may be jointly responsible to the vendor for the price of it. But if the wine, when purchased, is to be re-sold upon the joint account of the four, they then become partners in the transaction. If such purchasers, intending to divide the goods as they are purchased, and not to deal with them afterward for their joint profit, employ an agent to go into the market and make the purchase, or send one of their own body to strike the bargain as the ostensible buyer, they do not become partners in the purchase, and are not even jointly responsible to the vendor for the price, whether the ostensible buyer buys in one lot and makes one purchase on behalf of all jointly, or makes several purchases on behalf of each individually. (m) "This agreement," observes Domat, "renders the thing bought the common property of all of them; but it does not join them together in partnership; for they are not bound together by the choice of the persons, but only by the thing which they have in common. (n) In every [*795] partnership there is a community of *interest; but every community of interest does not create a partnership." (o)

Tenancy in Common of Chattels not constituting a Partnership. — "If two have jointly by gift, or by buying, a horse or an ox, &c., and the one grant that to him belongs of the same horse or ox to another, the grantee and the other which did not grant

(m) *Coope v. Eyre*, 1 H. Bl. 37; *longe remotum est.* — *Dig. lib. 17, tit. 2, lex 33.* *Hoare v. Dawes*, 1 Doug. 373.

(n) *De la Société*, liv. 1, tit. 8, sects. 3, 7. "In emptionibus qui nolunt inter se contendere, solent per nuntium rememere in commune, quod a societate

(o) Domat (*Société*) tit. 8; *Dig. lib. 17, tit. 2, lex 31.* "Toute société est une communauté, mais toute communauté n'est point une société." — *DURANTON*, 17 art. 320.

shall have and possess such chattel in common." (*p*) And if two tenants in common of a horse mutually agree that one of them shall have the general management of the horse, and enter him for different races, and that the expenses of the horse's keep and the winnings at races shall be equally divided between them, this will not make them partners in the horse, or prevent the one who has paid for the horse's keep from recovering a moiety of the cost thereof from his co-tenant in common. (*q*)

Conditions precedent to the Formation of a Partnership. —

"If a person agrees to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, there is no contract of partnership until all those conditions are performed." (*r*) If a prospectus for the formation of a partnership states that the capital is to consist of a certain amount of money, to be divided into a certain number of shares, and that a deed of co-partnership is to be executed, a subscriber who takes shares, and pays a deposit thereon, does not become a partner with the projectors and other subscribers, unless all the shares have been taken, the full amount raised, and the deed executed. (*s*) But if, with a full knowledge of the terms of the partnership remaining unfulfilled, and of the conditions on which the partnership was to be formed being unaccomplished, he does acts amounting to an assent to the carrying on of the concern in its incomplete state, such acts amount to a waiver of the conditions, and he becomes a partner in an actually existing partnership. (*t*) And a partnership may commence at once, although a deed of co-partnership or of settlement has to be executed, and other things remain to be done at some subsequent period. (*u*)

It is no answer to an action for breach of an agreement to *enter into partnership with the plaintiff that, after [* 796]

(*p*) Litt. sect. 321.

(*q*) French v. Styring, 2 C. B. n. s. 357; 26 L. J. C. P. 181.

(*r*) Dickinson v. Valpy, 10 B. & C. 142; Bourne v. Freeth, 9 B. & C. 640; Howell v. Brodie, 8 Sc. 372.

(*s*) Fox v. Clifton, 4 M. & P. 676; 6

Bing. 776; Pitchford v. Davis, 5 M. & W. 2; Galvanized Iron Co. v. Westoby, 8 Exch. 17.

(*t*) Tredwen v. Bourne, 6 M. & W. 461; Steigenberger v. Carr, 3 Sc. N. R. 466.

(*u*) Battley v. Bailey, 1 Sc. N. R. 143.

the agreement and before breach, the defendant discovered that the plaintiff had, before the agreement, acted with fraud and dishonesty towards a former partner of the plaintiff in the conduct of the partnership business which had been carried on by the plaintiff and such partner, and that such fraudulent and dishonest acts were unknown to the defendant at the time of his entering into the agreement. (x)

Specific Performance of a Contract for a Partnership.—As a general rule, the court will not decree specific performance of a contract for partnership, whether for an indefinite or for a specified period. (y) But after a partnership has commenced, the court will carry into effect the articles of partnership. (z)

Of a Partnership in Profits, but not in the Capital Stock.—There may be a partnership as regards the accruing profits of a business or joint speculation, when there is no partnership, nor even a community of interest, in the capital stock of the business. Thus where several persons unite together for the purpose of carrying on the business of common carriers of passengers and goods, and one finds a coach, and the others divide the road into districts, and each horses and conveys the coach through his own district, finding his own horses, harness, stables and equipments, servants and coachmen, and all things necessary for the purpose, there is no partnership in the stock in trade, although there is a partnership in the accruing profits. (a) So (to cite an example from Pothier) if the separate owners of two cows agree to send their milk together to market, and sell it for their joint benefit, there is no partnership in the cows, although the parties are partners in the sale of the milk. And if goods are sent to a broker to sell, under an agreement that he is to have half of whatever he can get for them beyond a certain amount, there is no partnership in the goods, although he is a partner with the owner in the sale. (b) If an author and a publisher agree to publish and sell a work upon their joint account, and to divide the profits of the sale, and it is stipulated between them that

(x) *Andrews v. Garstin*, 31 L. J. C. P. 15.

(y) *Scott v. Rayment*, L. R. 7 Eq. 112; 38 L. J. Ch. 48.

(z) *England v. Curling*, 8 Beav. 129.

(a) *Barton v. Hanson*, 2 Taunt. 51.

(b) *Smith v. Watson*, 2 B. & C. 401.

the author shall write the book, and furnish a certain quantity of manuscript, and that the publisher shall print and publish it at his own expense, receive the produce of the sale, and, after deducting the expenses of the publication, divide the profits between himself and the author, there is no partnership in the unsold copies of the work, but only in the profits of the sale. (c) In many cases, however, * where parties agree [* 797] to manufacture a commodity to be sold on their joint account, the one finding the raw material, and the other the labor and skill necessary for the purpose, there is a partnership between them in the manufactured article itself, as soon as it is completed and made ready for sale, as well as in the profits of the sale. (d)

Introduction of New Partners. — A partner in a private commercial partnership (not being a public joint-stock company with transferable shares) cannot introduce a stranger into the firm as a partner without the consent of all the members of the co-partnership. (e)

Contracts between the Firm and one of the Partners. — At common law, if a plaintiff in an action against a firm in partnership upon a partnership contract was himself a member of the firm, the action was not maintainable; for being himself liable as one of the partners upon all contracts binding upon the co-partnership, he was in principle, it was said, both plaintiff and defendant in the action, which could not be permitted. (f)

This rule of law was often productive of great hardship and inconvenience, as it deprived a partner of all remedy at common law for the recovery of money lent or goods supplied to, or work done by, him for the benefit and at the request of the firm, after he became a partner, (g) unless he had taken care to obtain

(c) *Wilson v. Whitehead*, 10 M. & W. 503.

(d) *Puff. de Jure Nat. et Gent. lib. 5, c. 8, 514, ed. 1729.*

(e) *Domat, de la Société, tit. 8, sect. 2, No. 5; Ex parte Barrow*, 2 Rose, 225.

"*Socius mihi esse non potest, quem ego socium esse nolui; quid ergo, si socius meus eum admisit, ei soli socius est.*" — *Dig. lib. 17, tit. 2, l. 19, 20.*

(f) *De Tastet v. Shaw*, 1 B. & Ald. 669; *Neale v. Turton*, 12 Moore, 368;

4 Bing. 149; *Mainwaring v. Newman*, 2 B. & P. 120, 125; *Teague v. Hubbard*, 8 B. & C. 345.

(g) He was not, of course, precluded from suing in respect of money lent or work done before he became a partner. *Lucas v. Beach*, 1 Sc. N. R. 350.

the individual and personal security of the other partners for the repayment of the money or the price of the goods and the work; (*h*) and he was, consequently, frequently driven into courts of equity for relief, where no technical difficulty was allowed to stand in the way of substantial justice. (*i*) One of the absurd consequences of this rule was, that the partners in one house of trade could not maintain an action against a partner in another house of trade, upon contracts made between the co-partnerships, if one of the partners of either house happened, at the time of making such contracts, to be a partner in both houses, whether the action was brought in the life-
[* 798] time of the common partner, or after his *decease. (*k*)

"In this respect," observes Story, J., "the Roman law, the law of France, and the law of Scotland present a marked contrast to the common law." (*l*)

Contracts between Partners individually in their own Names.

— But if the contract, though made concerning the partnership affairs, and in furtherance of the joint undertaking, was the individual contract of the partners who were parties to it, the objection did not apply. (*m*) Bills of exchange drawn by one partner on one or more of his co-partners individually, and accepted by any one or more of them individually in his or their own name or names, no mention being made of the firm, rendered the parties whose names appeared on the face of such bills individually liable to the payee, whether he was a partner with them in the firm or not, and whether the bill had or had not been drawn and accepted in respect of a partnership transaction, inasmuch as the contract was not, in such a case, the contract of the firm, but the contract of the individual partner or partners signing it. (*n*)

(*h*) *Moffat v. Van Mullingen*, 2 B. & P. 124, n.; *Perring v. Hone*, 4 Bing. 28; 12 Moore, 146; *Neale v. Turton*, ib. 365; *Goddard v. Hodges*, 1 Cr. & M. 37; *Sharpe v. Cummings*, 14 L. J. Q. B. 10.

(*i*) By the Roman law every partner who incurred expenses in the common affairs of the firm was entitled to compensation out of the joint stock; Dig. lib. 17, tit. 2, lex 52, sect. 4; lex 61.

(*k*) *Bosanquet v. Wray*, 6 Taunt. 597.

(*l*) Story on Partners, 323, n. 1; 345, n. 5.

(*m*) *Lomas v. Bradshaw*, 19 L. J. C. P. 273.

(*n*) Best, C. J., 12 Moore, 368; *Fox v. Frith*, 10 M. & W. 131; *Siffkin v. Walker*, 2 Campb. 307.

Covenants and agreements between partners to contribute capital or labor to the joint stock of the co-partnership, or not to trade on their own account, entered into by them in their own names with each other, created, consequently, a binding obligation upon such partners. The covenant of each covenantor was, in contemplation of law, made with all the rest, excluding himself; and all the rest were joint against him; "for if there be twenty partners, and one of them covenants with all the rest, he is in that respect several from them all, and they all joint against him." (o) And as regarded simple contracts between partners in their own names individually for the formation of a joint stock, and a contribution of capital by each of them, any one of the partners neglecting to pay his proportion of the agreed capital might be sued by all the rest, as the contract was in like manner with all the rest, excluding himself, he being in contemplation of law several from them all in respect of his particular share of the joint contribution, and they all joint against him. (p) If several of the partners signed an agreement constituting one of their number a trustee for the whole body, and authorizing him to sue for and receive their several contributions to the joint stock, each of the partners signing the agreement was liable to an action at the suit of the partner so appointed for not paying up his share of * the contribution. (q) If [* 799] two persons agreed to divide the profits of a joint adventure, and to bear equally the expenses of setting the scheme afloat, and one of them paid the whole expense, he might sue the other for a moiety of the charges he had incurred. (r)

Where an author and a publisher undertook the publication and sale of a work for their joint benefit, the author agreeing to supply a certain quantity of manuscript, and the publisher agreeing to print and publish the work at his own expense, and to divide the profits with the author, and the latter, after a portion of the work had been printed, refused to complete it, the publisher might have maintained an action against him for the

(o) *Thimblethorp v. Hardesty*, 7 Mod. 117; *Eccleston v. Clipsham*, 1 Sand. 153; *Vesey v. Mantell*, 9 M. & W. 325; *Saunders v. Johnson*, Skin. 429.
 (p) *Venning v. Leckie*, 13 East, 7.
 (q) *Brown v. Tapscott*, 6 M. & W. 123; *Radenhurst v. Bates*, 11 Moore, 401; *Spencer v. Durant*, Comb. 115.
 (r) *French v. Styring*, ante, p. * 795.

damage he sustained by reason of the non-performance of the contract. (s)

Distribution of the Profits of Co-Partnerships.— If a partner having the general conduct and management of a partnership business, had covenanted in his own name with another partner to render accounts and divide profits in hand, an action was maintainable against him by the covenantee for not accounting; (t) but there was no remedy against him at common law for not dividing the profits, so long as the partnership continued, and the trading transactions of the firm had not been brought to a close. If the partners resorted to the Court of Chancery for an account, they must by their bill have prayed for a dissolution. (u) In the absence of any evidence, the presumption is that partners are equally entitled to the profits, and equally liable to bear the losses of the business. (x)

Action by one Partner against another for a Balance found to be due on a Settlement of Accounts.— When the partnership was at an end, and all its trading transactions had been brought to a close, and an ascertained balance of profit remained in the hands of one of the late partners upon a general settlement of the accounts, an action was maintainable for the recovery of such balance. (y)

Action for a Share of the Profit of a Particular Joint Adventure.— Where partners had merely agreed to divide the profits of one joint adventure, and all outstanding debts and [* 800] liabilities in * respect thereof had been satisfied and discharged, one of the partners might have brought an action for his share of an ascertained balance which had been received by another. (z) But if it appeared that the parties were continuing partners in trade, so that the profit upon one transaction might be absorbed by the losses upon other sub-

(s) *Gale v. Leckie*, 2 Stark. 107.

(t) *Owston v. Ogle*, 13 East, 541.

(u) *Loscombe v. Russell*, 4 Sim. 10.

By the Roman law, an action by one partner against the others for an account operated as a dissolution of the co-partnership; Dig. lib. 17, tit. 2, lex 65.

(x) *Collins v. Jackson*, 31 Beav. 645.

(y) *Foster v. Allanson*, 2 T. R. 479;

Rackstraw v. Imber, Holt, N. P. C. 370;

Wray v. Milestone, 5 M. & W. 21;

Jackson v. Stopherd, 2 Cr. & M. 361;

Brierley v. Cripps, 7 C. & P. 709; *Winter v. White*, 3 Moore, 674; *Henley v. Soper*, 8 B. & C. 16.

(z) *Wilson v. Cutting*, 4 M. & Sc.

268; *Goodyear v. Simpson*, 15 M. & W.

16; 15 L. J. Ex. 191.

sequent transactions, no action was maintainable for the balance of profit appearing upon any one particular statement of accounts respecting bygone transactions completed and done with. (a)

Contribution between Partners to the Common Loss.—The courts of common law professed to be utterly unable to investigate partnership accounts; and, therefore, whenever the right of contribution between partners depended upon the state of partnership accounts and dealings and the existence of a balance in hand, the claimant must have resorted to a court of equity for relief. (b) But when the partnership was at an end and the trading operations had been wound up and completed, a right to contribution as between those who had been lately partners existed. Thus where a partnership business was brought to a close, and the accounts made out and shown to the defendant, one of the partners, who promised to pay to the plaintiff his proportion of the loss, but failed so to do, it was held that the latter was entitled to recover it in an action on an account stated. (c) And if the partnership had been confined to a particular transaction and joint speculation which had proved to have been a losing adventure, and one partner had been compelled to pay the whole loss, or more than his proper proportion of it, such partner might, if the joint undertaking had been brought to a close, and there were no open and unsettled accounts respecting the matter, and nothing more to be received in respect thereof, have maintained an action against his late co-partner in the business for his share of the contribution towards the common loss. (d)

Particular Transactions not connected with the General Account of Profit and Loss.—General partners in trade are not precluded, as we have seen (*ante*, p. * 797), from suing each other upon special contracts entered into with each other individually on their own private account, although such contracts might have been made concerning the partnership business, and were

(a) *Fromont v. Coupland*, 9 Moore, 323; *Carr v. Smith*, 5 Q. B. 128-138. (c) *Brown v. Tapscott*, 6 M. & W. 123.

(b) *Pearson v. Skelton*, 1 M. & W. 504; *Sadler v. Nixon*, 5 B. & Ad. 936; (d) *Burnell v. Minot*, 4 Moore, 342; *Holmes v. Williamson*, 6 M. & S. 158. Dig. lib. 17, tit. 2, lex 57.

intended to promote the general prosperity of the co-[*801] partnership. (e) If one partner, *for example, lent money to another to be employed in the business, or pledged his own private credit to enable his co-partner to obtain money or goods for the purpose of making up his proportion of the contribution to the general stock, the partner who had so lent his money or pledged his credit, had the same remedy against the co-partner in whose favor he had acted as any third party would have had. (f) So if one partner received money which properly belonged to his co-partner and not to the partnership, and appropriated it by mistake to the use of the firm, he was responsible to the partner whose separate money it was for the re-payment to him of the amount. (g) And if one partner borrowed money from the firm, and by his promissory note promised one of the partners individually to repay the amount, he was liable upon the note, although the money, when recovered by the holder of the note, would be the money of the firm. (h)

Purchases by one Partner on Behalf of the Firm. — Where four partners carrying on the business of sugar-refining, intrusted to one of them (who was a wholesale grocer) the duty of buying sugars on behalf of the firm, and the partner so employed sold to the firm his own sugars, making a profit to himself on his dealings and transactions, without the knowledge of his co-partners, it was held that the firm was entitled to the whole of this profit. (i)

Fraudulent Use of the Co-Partnership Name. — If one partner has cheated his fellow-partners through the intervention of a promissory note given by him in the name of the firm, the fellow-partners are entitled to recover against him the sum paid in satisfaction of the apparent debt of their own on the note created by his fraud on the partnership. (k)

Contracts of Partnership induced by Fraud. — If a person has been induced by fraudulent representation by one or more of

(e) *Coffee v. Brian*, 10 Moore, 345.

(g) *Smith v. Barrow*, 2 T. R. 476.

(f) *Elgie v. Webster*, 5 M. & W.

(h) *Lomas v. Bradshaw*, 19 L. J. C.

518; *Ex parte Notley*, 1 Mon. & Ayr.

P. 273.

48; *Helme v. Smith*, 5 M. & P. 744; 7

(i) *Bentley v. Craven*, 18 Beav. 75.

Bing. 714; *Hesketh v. Blanchard*, 4

(k) *Cross v. Cheshire*, 7 Exch. 46; 21

East, 144.

L. J. Ex. 3.

several partners to become a member of the firm, he is entitled to relief, and to have the contract set aside. (*l*)

Injunction to prevent Injury to the Firm.—The court also will prevent one of several partners from doing acts tending to depreciate the value of the partnership property, and injuring the credit of the firm; (*m*) and from disposing of the joint stock to his own private purposes in fraud of his co-partner. (*n*)

*** Of Dissolution of Partnership.**—If no time has [*802] been limited for the dissolution of a general trading partnership, it is a partnership at will, and may be dissolved at the pleasure of any one or more of the partners. (*o*) If the co-partnership has been contracted by parol, it may be renounced by parol; but if it has been established by deed, the renunciation and disclaimer of it by the party who withdraws from the firm ought to be made by deed. (*p*) If the partners have agreed that the partnership shall continue for a definite period, it can only be dissolved before the expiration of the term limited by the mutual consent of all the parties, or by the bankruptcy, outlawry, embezzlement, felony, or death of any one or more of them, or by the decree of a court. (*q*) Where a partnership originally carried on under articles for a fixed term of years is continued after the expiration of the term without new articles being entered into, it becomes a partnership at will; and such only of the articles as are applicable to a partnership at will remain in force. (*r*) Temporary illness or incapacity to transact business will not warrant an application to the court for the dissolution of such a partnership; but if the illness or incapacity is long continued, or recovery appears to be hopeless, a dissolution will be decreed. (*s*) Actual insanity of one partner is not in itself a dissolution of the partnership; but it is a good ground

(*l*) *Rawlins v. Wickham*, 3 De G. & J. 304; *Jauncey v. Knowles*, 29 L. J. Ch. 95.

(*m*) *Marshall v. Watson*, 25 Beav. 504.

(*n*) *Hartz v. Schrader*, 8 Ves. 317.

(*o*) *Pearce v. Lindsay*, 3 De G. J. & S. 139; *Shepherd v. Allen*, 33 Beav. 577.

(*p*) *Peacock v. Peacock*, 16 Ves. 49.

(*q*) *Smith v. Mules*, 9 Hare, 556; *Essell v. Hayward*, 29 L. J. Ch. 807; 30 Beav. 158; *Harrison v. Tennant*, 21

Beav. 482.

(*r*) *Clark v. Leach*, 32 Beav. 14; 32 L. J. Ch. 290; *Cox v. Willoughby*, 13 Ch. D. 863.

(*s*) *Leaf v. Coles*, 1 De G. M. & G. 174; *Whitwell v. Arthur*, 35 Beav. 140.

for a decree of dissolution. (t) The partnership is dissolved by the death or insolvency of one of the partners, or by an act of bankruptcy followed up by adjudication, and also by assignment by any partner of his share and interest in the business. And a dissolution by one partner is a dissolution as to all; so that the affairs of the old concern must be wound up from the day of the retirement. (u) If the deed of co-partnership contains a power of expulsion of any one or more of the partners upon certain contingencies, the power must be exercised with the most perfect good faith and fairness, and in strict conformity with the stipulations and provisions of the deed, every opportunity being given to the expelled partner to bring to the knowledge of his co-partners all the facts and circumstances necessary to enable them to make a just exercise of their power. (x) A dissolution which is fraudulent as against the joint creditors may be [* 803] * avoided. (y) When a partnership is determined prematurely, if the incoming partner has paid a premium, he is entitled to have a proportionate part of the premium returned, except, first, where there has been an actual or implied release or waiver of the right to it; or secondly, where there has been an actual or implied release of the right to be a partner, including such a deliberate and serious breach of the partnership contract as may be considered equivalent to a repudiation of it altogether. (z) Where, therefore, the partner who has received the premium afterward commit a breach of the partnership articles and dissolves the partnership or renders its continuance impossible, the court will not allow him to take advantage of his own wrong, but will decree a restitution of a portion of the premium paid; but if the partner who has paid the premium commits a like breach, and is himself the author of the dissolution, the court will not allow him to found a claim to the restitution

(t) Anon. 2 K. & J. 441; Rowlands v. Evans, 30 Beav. 302; 31 L. J. Ch. 265. Wood v. Wood, L. R. 9 Eq. 190; but see Russell v. Russell, 14 Ch. D. 471.

(u) Collier on Partnership, 68-75, 25. (y) *Ex parte Mayou*, 34 L. J. Bank.

154. (z) Wilson v. Johnstone, L. R. 16 Eq. 606; 42 L. J. Ch. 668; Black v. Capstick, 12 Ch. D. 863.

of the premium upon his own wrongful act. (a) On a bill to dissolve a partnership, and take the usual partnership accounts, although the partnership had been discontinued more than six years before the filing of the bill, the court directed the accounts to be taken, notwithstanding that the defendant insisted on the statute of limitations as a bar. (b)

Distribution of the Partnership Property and Effects.— If a house in which the partnership trade is carried on belongs to one of the co-partners, the right to the occupation of the premises by the other partners ceases as soon as the firm is dissolved, unless the house has been demised to the firm collectively. (c) Upon the dissolution of a mercantile partnership by death of one of the partners, the property and effects of the co-partnership do not belong exclusively to the survivors, but to the survivors and the representatives of the deceased partner, and are distributable between them in the same manner as they would have been by dissolution of the partnership *inter vivos*. The surviving partners have no *jus disponendi* of the partnership property and effects, as against the personal representatives of the deceased, except for the purpose of paying debts due from themselves and the deceased at the time of the death of the latter. They cannot mortgage the share of the deceased together with their own shares of the partnership property to enable them to pay debts and continue the trade; (d) but they may become purchasers of the share of the deceased partner from his personal representatives. (e) * If partners have purchased land [* 804] merely for the purpose of carrying on their trade, and have paid for the land out of the partnership funds, the transaction makes the land partnership property, and the court will deal with it as personalty, and the share of a deceased partner therein will pass to his personal representatives. (f) But where the land, and not the trade, is the principal object, and the trade is merely ancillary to the beneficial enjoyment of the land, this

(a) *Atwood v. Maude*, L. R. 3 Ch. 369.

(b) *Miller v. Miller*, L. R. 8 Eq. 499.

(c) *Benham v. Gray*, 5 C. B. 141.

(d) *Buckley v. Barber*, 6 Exch. 180; 2 L. J. Ex. 117.

(e) *Chambers v. Howell*, 11 Beav. 6.

(f) *Darby v. Darby*, 3 Drew. 495; 25 L. J. Ch. 371.

doctrine will not apply. (*g*) Partnership stock includes the good-will of the business and the right to use the trade-mark; and on the purchase by a surviving partner from the executors of a deceased partner of the partnership stock at a valuation, the value of the good-will and of the trade-mark must be taken into account. (*h*) In taking the accounts of a partnership, interest after the dissolution will not in general be allowed to the partners on their respective capitals, though interest during the partnership with annual rests is allowed. (*i*) Nor in the absence of special agreement will interest be allowed on the profits left by a partner in the business. (*k*) Where after the expiration of the articles, B carried on the business with A's capital (who was dead), it was held that after making B an allowance for carrying on the business, the profits must be divided between A's representatives and B, according to their respective amounts of capital. (*l*)

Use of the Name of the Firm after Dissolution or Assignment.

— After a partnership has been dissolved, each partner is entitled, in the absence of express agreement, to carry on business in the name of the old firm. (*m*) And the assignment of the good-will and business will, it seems, include the exclusive right to use the name of the old firm. (*n*)

Conversion of Partnership Property. — If one of two partners carries off the partnership property, and pledges it without the knowledge or assent of the other, this is not a conversion of the property by the pledgor, and does not render him liable to be sued by his co-partner, as he has a right to pledge to the extent of his limited interest, and to create a lien upon the partnership property. (*o*)

(*g*) *Steward v. Blakeway*, L. R. 6 Eq. 479; *ib.* 4 Ch. 603.

(*h*) *Hall v. Burrows*, 33 L. J. Ch. 204.

(*i*) *Barfield v. Loughborough*, L. R. 8 Ch. 1; 42 L. J. Ch. 179.

(*k*) *Dinham v. Bradford*, L. R. 5 Ch. 519.

(*l*) *Yates v. Finn*, 13 Ch. D. 839.

(*m*) *Banks v. Gibson*, 34 L. J. Ch. 591; 34 Beav. 566.

(*n*) *Levy v. Walker*, 10 Ch. D. 436.

(*o*) *Jones v. Brown*, 25 Law J. Exch.

345; *Fenning v. Ld. Grenville*, 1 Taunt. 248; but he would, it seems, be entitled to an action of account under the 4 Anne, c. 16, sect. 27; *Jacobs v. Seward*, L. R. 5 Eng. & Ir. Ap. 464.

* SECTION II.

[* 805]

OF JOINT-STOCK COMPANIES.

Joint-Stock Companies.¹—The rights *inter se* of the members of a joint-stock company are regulated by the joint-stock com-

¹ To draw a useful yet simple parallel between the English law of joint-stock companies and the American law of private business corporations is not easy, on account of the differences between the systems of nomenclature in use in the various jurisdictions. Speaking with reference to general usage, and disregarding local peculiarities, it may be said that "joint-stock company" denotes a union of persons owning together a capital stock which they have devoted to a common purpose, under an organization analogous to that of a corporation, or a body upon which some of the privileges or powers of corporations have been conferred by statute, but which is not in a full sense a corporation. As sometimes used, however, the idea of incorporation is not excluded; thus insurance companies are called mutual or joint-stock companies, without intending to imply that they are not incorporated.

The English use of the term is more definite and extensive than the American. In both countries there has been a great extension of the principle of allowing men to combine for a large enterprise, without assuming the full liability of partners; and in both countries a danger has been seen in giving to members of such combinations the entire immunity from liability possessed by members of corporations formed under the old common law forms of incorporation. In England, the policy has been to confine incorporation to its original meaning, and grant it only in rare cases; while laws have been passed which allow partnerships under such names as joint-stock companies, public companies, &c., to assimilate themselves to corporations, and enjoy, to a considerable extent, corporate powers, and exemption from personal liability, but which do not affect to recognize such bodies as "corporations" in the full sense of that term. In this country, upon the other hand, it has been thought convenient to create corporations, under that name, for almost any purpose for which simple partnership forms were inadequate, and to secure creditors by imposing an individual liability upon members or officers of the corporation. Hence much of the law of English joint-stock companies applies directly to what in this country are termed "corporations," especially the corporations allowed by the laws of the various States to be formed by filing articles of association under what are known as "general laws" of incorporation.

In England, a joint-stock company has been defined to be a qualified or *quasi* corporation, constituted neither by charter, act of parliament, nor letters-patent, but by the act of the members themselves, the interest of every member whereof is freely transferable without the consent of the rest. 3 Steph. Com. 19. Such companies, established before the passing of what are known as the "joint-stock companies acts," and conducted without adopting their provisions, are simply partnerships. Any one might consist of a large number of members; but their rights and liabilities are precisely the same as those of any other sort of partners,

panies acts, and by the memorandum and articles of association. Where these are silent, the ordinary law of partnership applies.

subject only to the peculiar regulations contained in an instrument of organization called a deed of settlement. The capital is divided into equal parts, called shares; each member of the company has a certain number of these, and is entitled to participate in profits according to his number of shares. The management of the business is confided to some few shareholders, called directors, and the general body of the shareholders have, unless on extraordinary occasions, no power to interfere in the concerns of the company. But it early became usual for such companies to obtain a private act of parliament in aid of their deed of settlement; and at length certain general acts were passed for the regulation of such companies; and these acts correspond in nature and utility to the general acts of incorporation which have become so common throughout the United States.

Brown (Law Dict.) gives a summary of these joint-stock companies acts of parliament as they were in force down to 1874, from which it appears that joint-stock banking companies form one important and quite distinct class, subject to enactments appropriate to them. All joint-stock banking companies, if formed under stat. 7 Geo. IV. c. 46, and not registered since, are governed by that act and their deed of settlement; if formed and registered under the act of 1857 (20 & 21 Vict. c. 49), they are governed by their deed of settlement, and so much of the Companies Act of 1862 as applies to companies registered but not formed under it; if formed under the 20 & 21 Vict. c. 14, and 21 & 22 Vict. c. 91, they are governed by their rules and articles of association and the Companies Act of 1862; or if formed under the Companies Act of 1862 (25 & 26 Vict. c. 89), they are governed exclusively by the provisions of that act. But national banking associations and State banks in America are so definitely regulated by banking laws or special charters, that English decisions as to the organization and conduct of banking companies can have but limited application here.

Joint-stock companies other than banks Brown divides into two classes, according as they have or have not been by subsequent legislation excepted from the operation of stat. 7 & 8 Vict. c. 110. That act defined the voluntary societies with transferable shares which were subject to its operation to embrace every partnership whereof the capital is divided into shares transferable without the express consent of all the purchasers; and also specified associations for the insurance of lives or property, or for granting annuities on lives; and also friendly societies making assurances on lives to the extent specified; and also every partnership which at its formation or by subsequent admission (except any admission subsequent on devolution or any act in law) shall consist of more than twenty-five members; and required their registration. That statute was, however, superseded by the Joint-Stock Companies Act, 1856 (19 & 20 Vict. c. 47), which has since been repealed by the Companies Act, 1862 (25 & 26 Vict. c. 89); and this latter statute was yet in force at the date when Brown wrote (1874). From Addison's text it appears still to be the chief guide as to the management of active companies, though some matters of detail and the general subject of "winding up," or dissolution and liquidation, appear to be governed by more recent statutes, for particulars of which the reader is referred to the text. For general accounts later than Brown's, see Wharton's L. Dict. (6th ed.), *Joint-Stock Company*; Sweet's L. Dict., *Company*, and *Companies Acts*. This act (the Companies Act of 1862, 25 & 26 Vict. c. 89) consolidates the previous laws relating to joint-stock companies, and embraces within its operation the great bulk of the companies — the private business corporations aggregate, as they might be called in this country — existing throughout the kingdom.

A company created a corporation under the Companies Act, 1862, (*p*) is not thereby created a corporation with inherent

By its requirements, with a general exception of companies and partnerships formed under some other act, or under letters-patent, or engaged in working mines within the jurisdiction of the Stannaries, every banking company or partnership consisting of more than ten persons, and every other company or partnership having for its object the acquisition of gain, and consisting of more than twenty persons, established since Nov. 1, 1862, *must*, and any company consisting of seven or more persons associated for any lawful purpose *may*, be formed and registered under the statute. And mining companies in the Stannaries may register under it, and then become subject to its provisions, and a peculiar jurisdiction of the Stannaries Court, conferred by the statute. Every other company, too (except a railway company), whether previously existing or formed afterward in pursuance of an act of parliament or letters-patent, or otherwise duly constituted by law, and every unregistered company consisting of more than seven members, may, with the assent of the shareholders, be registered as a limited or unlimited company under its provisions. If not thus registered, the law of companies established under private acts of parliament, charters, or letters-patent is that laid down by their acts, charters, or letters-patent.

For recent accounts of the general American law governing business corporations, incorporated associations, joint-stock associations or companies, &c., as the various bodies substantially corresponding to English joint-stock or public companies are called, see Abb. Dig. Corp. 1869, and ib. Supp. 1879; Angell & Ames, *Private corporations aggregate* (11th ed. 1882), a standard treatise; Boone, *Manual of the law of corporations generally* (1882), a small and very concise yet comprehensive compilation of the points of American and English decisions; Field, *Private corporations* (1877); Morawetz, *Private corporations other than charitable* (1882); Potter, *Corporations general and local, public and private, aggregate and sole* (1879); these three are general treatises; Proffatt, *Private corporations under Cal. Civ. Code* (1876); Withrow, *American corporation cases*, continued by Binmore, republishing the reported decisions of courts of last resort and U. S. circuit courts since 1867; Clemens, *Corporate securities* (1877); Field, *Ultra vires* (1881); Mills, *Eminent domain* (1879); Thompson, *Liability of stockholders* (1879); Thompson, *Liability of officers* (1880); U. S. Dig. tit. *Corporations*; also, titles of particular kinds of companies.

Ball, the *National Bank Act* (1881); Cleaveland, the *Banking system of New York* (2d ed.); Morse, *Banks and Banking* (2d ed. 1879); Thompson, *National Bank Cases* (1878), continued by Browne (1880); these volumes republish the State and Federal decisions; Abb. Dig. Corp. tit. *Banks*; U. S. Dig. tit. *Banking*.

Endlich, *Building Associations* (1882); Abb. Dig. Corp. tit. *Building Societies*; U. S. Dig. tit. *Building Societies*.

Abb. Dig. Corp. tit. *Benefit Societies*; U. S. Dig. tit. *Benefit Societies*.

Abb. Dig. Corp. tit. *Express Companies*; also U. S. Dig. tit. *Express Companies*.

Abb. Dig. Corp. tit. *Gas Companies*; also U. S. Dig. tit. *Gas Companies*.

Insurance companies are treated in works discussing insurance viewed as a business or as a species of contract; the chief of which are named *ante*, pp. * 675, * 730, * 739, American notes.

Abb. Dig. Corp. tit. *Joint-Stock Companies*, and tit. *Associations*; also U. S. Dig. same titles.

Baker, also McMaster, on *New York manufacturing companies laws*; Batch-

common law rights. It is bound by its memorandum of association, which is its charter; and a contract made by its directors upon a matter not included in the memorandum is not binding on the company, even if assented to by the whole of the shareholders; (q) but such things as are fairly incidental to those which the company are expressly authorized to do may be done. (r)

General Duties of Directors.—There is by law, without any special provision for the purpose, an implied and inherent term of the engagement or relationship subsisting between directors and shareholders, that directors shall use their best exertions in all matters relating to the affairs of the company, that they shall not make any profit to themselves out of their trust or employment, and that they shall not acquire to themselves, whilst they remain directors, any interest adverse to their duty. (s) But their duty as directors may be controlled and qualified by the rules and objects of the society, and the nature and extent of the authority delegated to them by their shareholders. (t) Directors of a company are not, as such, trustees any more than they are agents of those who deal with the company; they are the agents and in some respects trustees of the company and its shareholders, not of strangers dealing with the company by way of contract. They are merely agents of the company in respect of the contracts made between the company and strangers. (u) If

elder, on Massachusetts laws of manufacturing or business corporations; Abb. Dig. Corp. tit. *Manufacturing Companies*; U. S. Dig. tit. *Manufacturing Companies*.

Blanchard & Weeks, Leading cases on mines, &c. (1877); Morrison, Mining decisions (1878); Abb. Dig. Corp. tit. *Mining Companies*; U. S. Dig. tit. *Mines*.

The leading works on railroad companies and their management are named *ante*, p. * 519, American note.

Allen, Telegraph cases (1873), republishing the reported cases; Scott & Jarnagin, Telegraphs (1868); Abb. Dig. Corp. tit. *Telegraph Companies*; U. S. Dig. tit. *Telegraph Companies*.

Abb. Dig. Corp. tit. *Turnpike Companies*; also U. S. Dig. tit. *Turnpike Companies*.

(q) *Ashbury Ry. Carriage Co. v. Beav.* 360; *Gt. Luxembourg Ry. Co. v. Riche*, L. R. 7 H. L. 653. *Magnay*, 25 ib. 586.

(r) *Atty.-Genl. v. Great Eastern Ry. Co.*, 5 Ap. Cas. 473; *In re West of England Bank*, 14 Ch. D. 317. (t) *Bluck v. Mallalue*, 27 Beav. 404.

(s) *Benson v. Heathorn*, 1 Y. & C. 518, C. A.; *Poole's case*, *infra*. (u) *Ferguson v. Wilson*, L. R. 2 Ch. 77; *Wilson v. Lord Bury*, 5 Q. B. D.

Ch. C. 341; *Gaskell v. Chambers*, 26

they make any profit on such contracts, the profit belongs to the company. (x)

Liabilities of Directors. — If the directors exceed their powers, * or appropriate the funds of the company in a [* 806] way not authorized by the articles of association or the deed of settlement, they are bound to make good out of their own pockets the full amount of money misappropriated or of loss caused by their negligence. (y) The directors are trustees for the shareholders, that is, for the company. They are the managing partners of the company, and if they abuse their powers, which they hold in trust for the company, to the damage of the company for their own benefit, they are liable to make good the breach of trust to their *cestui que trust* like any other trustees. But directors are not trustees for the creditors of the company. The creditors have certain rights against a company and its members, but they have no greater rights against the directors than against any other members of the company. (z) A director is not liable for a fraud (such as the issue of a fraudulent prospectus) committed by his co-directors or other agent, unless he has either expressly authorized or tacitly permitted its commission. (a) The owners of a concession from a foreign government, which was liable to forfeiture, combined with promoters of a company to sell the concession to trustees for the company, who transferred it to the company on payment for their share in the transaction. The trustees asked no questions, and the solicitors for the vendors, who also acted for the company, concealed the facts; it was held that the owners, promoters, and trustees must repay the money, and that the directors and solicitors must pay the costs of the suit. (b) But the directors, if exercising powers clearly conferred upon them, are liable only for gross negligence, and not mere imprudence,

(x) *Liquidators of Imperial Credit Co. v. Coleman*, L. R. 6 H. L. 189. Ireland v. Lord Fermoy, L. R. 5 Ch. 763; 39 L. J. Ch. 477.

(y) *Grimes v. Harrison*, 28 L. J. Ch. 827; *Turquand v. Marshall*, L. R. 6 Eq. 112; 4 Ch. 376; 38 L. J. Ch. 639; (z) *Poole's case*, 9 Ch. D. 322; see *ante*, p. * 805.

Joint Stock Discount Co. v. Brown, L. R. 8 Eq. 396; *Land Credit Co. of* (a) *Cargill v. Bower*, 10 Ch. D. 502.

(b) *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394.

especially where the party suing is the party who granted such powers. (c)

The 165th section of the Companies Act, 1862, (d) enacts that where in the course of winding up it appears that a director has misapplied or become liable for moneys, or been guilty of any misfeasance or breach of trust, the court may upon application compel him to repay or contribute to the assets. Where a director received from a promoter a number of paid-up shares to qualify him as director, and then assisted the promoter in selling a colliery for more than it was worth to the company, he was held liable to pay for the shares at their nominal par value. (e)

But where the company are parties to the fraud, and [* 807] * there is no fraud upon them, they themselves cannot recover from a director, for it is only the public who have been deceived. (f) To make a person liable under sect. 165, he must be shown to have been guilty of some misconduct by which the company has suffered loss, and not merely that he has acted as director without being duly qualified. (g)

Qualification of Directors. — It is frequently provided that no one shall be qualified to be a director who is not a holder of shares to a certain amount, and the holding of such shares has been held to be in some cases a condition precedent to the election, and the fact of a person having acted as director has been held to be no evidence of a contract to take the shares; (h) nor if coupled with the fact of his name being on the register as a shareholder. (i) If a person qualified to be a director agrees to become one, he thereby agrees to take the shares which it is necessary for a director to hold; (k) but if a person is not quali-

(c) *Overend, Gurney, & Co. v. Gibb*, L. R. 5 H. L. 480.

(d) 25 & 26 Vict. c. 89, sect. 165.

(e) *Pearson's case*, 5 Ch. D. 336; *Anderson's case*, 7 Ch. D. 75; *Weston's case*, 10 Ch. D. 579; and see *In re National Fund Ass. Co.*, 10 Ch. D. 118; *Mitcalfe's case*, 13 Ch. D. 168. These principles are applicable to proceedings in an action by the company to recover the value of the shares. *Nant-y-Glo Iron Co. v. Grave*, 12 Ch. D. 738.

(f) *In re Ambrose, Lake Tin Co.*, 14 Ch. D. 390.

(g) *Coventry's case*, 14 Ch. D. 660.

(h) *Jenner's case*, 7 Ch. D. 132; *De Ruvigne's case*, 5 Ch. D. 306; see a case where it was not so held, *In re Esparto Trading Co.* 12 Ch. D. 201.

(i) *Hallmark's case*, 9 Ch. D. 329.

(k) *Stephenson's case*, 45 L. J. Ch. 488; *Forbes's case*, L. R. 19 Eq. 353.

fied, and has not acted, but has refused to act, the fact that at a general meeting (not a meeting of the board of directors) he was elected a director, and shares were allotted to him, does not make him a director liable in respect of such shares. (*l*)

Of the Amalgamation of Companies.—A contract for the amalgamation of two joint-stock companies is *ultra vires* and void, unless the deeds of settlement of both companies contain special powers for the purpose. (*m*) The directors of the one company have no power to burden their shareholders with the debts and liabilities of the other company. (*n*) But a company may by its deed of settlement have power to amalgamate, and a policy-holder will be bound by an amalgamation strictly following the terms of the deed, (*o*) whether he holds his policy "according to the provisions of the deed of settlement" or not. (*p*) Where two companies amalgamated, and an indorsement was made on the policy of a policy-holder to the effect that the new company's funds should be liable, and future premiums paid to it, which was done, it was held that the novation was complete. (*q*)

Injunction to restrain Unauthorized Contracts.—It is *competent to any single shareholder to apply for and [* 808] obtain an injunction for the purpose of preventing the directors and the majority of shareholders of a registered company from entering into contracts for the carrying on a trade or business and the accomplishment of objects not warranted by the articles of association. (*r*) The court will restrain a public company which by its deed of settlement was empowered to refuse to authorize a transfer to any person not approved by them, from refusing to transfer at all, though whether it would compel them to authorize a transfer of shares to a nominee of a rival company was considered doubtful. (*s*) So the court will

(*l*) Barber's case, 5 Ch. D. 963.

(*p*) Dowse's case, 3 Ch. D. 384.

(*m*) Cork, &c. Ry. Co. v. Paterson,
18 C. B. 450.

(*q*) Miller's case, 3 Ch. D. 391.

(*n*) Era Ins. Co., *In re*, 30 L. J. Ch.
137; Harding v. Webster, 29 L. J. Ch.
161.

(*r*) Simpson v. Westm. Pal. Hotel
Co. (Limited), 29 L. J. Ch. 561; 8 H.
L. C. 712.

(*o*) Cocker's case, 3 Ch. D. 1; Hort's
case, 1 Ch. D. 307; Rivington's case, 3
Ch. D. 10; Doman's case, 3 Ch. D. 21.

(*s*) Robinson v. Chartered Bank, L.
R. 1 Eq. 32.

restrain a railway company from paying dividends out of capital, (t) or from prosecuting a suit not instituted by it. (u)

The Dissolution and Winding Up of Registered Joint-Stock Companies are regulated by the 25 & 26 Vict. c. 89. (x) In order to bring a society or association within the operation of the act, it must be shown that it was formed for the purpose of trading and making profit. Clubs, therefore, in the ordinary acceptation of the term, are not within the scope and operation of the statute; (y) but benefit building societies and friendly societies have been held to be within the repealed acts, for which the 25 & 26 Vict. c. 89, is substituted. (z) The assets of a company which is being wound up must be applied in satisfaction *pari passu* of the liabilities of the company as they exist at the commencement of the winding up. Where, therefore, prior to the winding up, a dividend had been paid under an inspectorship deed to some creditors of the company, but not to others, it was held that, there being no question of fraudulent preference, those who had not received any dividend were not entitled to a dividend under the winding up in priority to those who had. (a) After a resolution for voluntary winding up, a shareholder cannot obtain a compulsory or supervisional order, except where the voluntary resolution has been obtained by fraud, or where creditors appear in support of the petition. (b) When the business of the company has substantially ceased or become impossible, the court will order it to be wound up. (bb)

[* 809] * **Transfer or Sale of Property to another Company.**—
— By the 161st section of the Companies Act, 1862, (c)

(t) *Bloxam v. Metrop. Ry. Co.*, L. R. 3 Ch. App. 337; *Salisbury v. Metrop. Ry. Co.*, 38 Law J. Ch. 249; see *Hoole v. Gt. West. Ry. Co.*, L. R. 3 Ch. App. 262.

(u) *Kernaghan v. Williams*, L. R. 6 Eq. Ca. 228; see *Abrahams v. Lord Mayor, &c. of London*, L. R. 6 Eq. 625; *Pickering v. Stephenson*, L. R. 14 Eq. 322.

(x) See also the 31 & 32 Vict. c. 68, and the 33 & 34 Vict. c. 104.

(y) *St. James's Club, In re*, 2 De G. M. & G. 388.

(z) *St. George's Benefit Building Soc., In re*, 27 L. J. Ch. 97; *Nat. Indust. & Prov. Soc., In re*, 30 L. J. Ch. 940; *Mid. C. Ben. Build. Soc., In re*, 33 L. J. Ch. 739.

(a) *Re Smith, Knight, & Co., ex parte Ashbury*, L. R. 5 Eq. 223.

(b) *In re Gold Co.*, 11 Ch. D. 701.

(bb) *In re Haven Gold Co.*, 20 Ch. D. 151; *In re German Date Co.*, ib., 169.

(c) 25 & 26 Vict. c. 89, sect. 161.

where a company is proposed to be or is being wound up, and its property sold or transferred to another company, the liquidators may receive shares, policies, &c., of the other company for the benefit of their company. (d) It is no objection to an agreement between two companies under this section that it contains stipulations that the purchasing company shall take a portion only of the assets, or that the shares, &c., shall be given directly to the shareholders of the selling company, and not to the liquidator. (e)

Parties Liable to be made Contributories.— By the 25 & 26 Vict. c. 89, sect. 74, the term “contributory” is to mean every person liable to contribute to the assets of a company under that act in the event of the same being wound up. By sect. 75, the liability of any person to contribute to the assets of a company under that act, in the event of the same being wound up, is to be deemed to create a debt of the nature of a specialty, accruing due from such person at the time when his liability commenced, but payable at the times when calls are made for enforcing such liability. By sect. 38, in the event of a company under that act being wound up, every present and past member of the company is to be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves. But no past member is to be liable to contribute to the assets of the company, if he has ceased to be a member for one year prior to the commencement of the winding up. No past member is to be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member. No past member is to be liable to contribute to the assets of the company, unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them. In the case of a company

(d) There is a proviso as to dissentient members; and see sect. 162, giving notice, as to which see *In re Union Bank of Kingston-upon-Hull*, 13 Ch. D. 808.

(e) *In re City Investment Co.*, 13 Ch. D. 475.

limited by shares, no contribution is to be required from any member exceeding the amount unpaid on the shares in respect of which he is liable as a present or past member. In the case of a company limited by guarantee, no contribution is to be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association. The act is not to invalidate any provision [* 810] contained * in any policy of insurance or other contract, whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect thereof. No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, is to be deemed to be a debt of the company payable to such member, in a case of competition between himself and any other creditor not being a member of the company ; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves. By the 30 & 31 Vict. c. 131, sect. 4, where a company is formed as a limited company under the 25 & 26 Vict. c. 89, the liability of the directors or managers, or of the managing director, may, if so provided by the memorandum of association, be unlimited. By sect. 5, such director or manager, in addition to his liability to contribute as an ordinary member, is to be liable to contribute as if he were a member of an unlimited company. But no contribution required from any past director or manager who has ceased to hold such office for a period of one year, or required in respect of any debt or liability contracted after he ceased to hold such office, is to exceed the amount which he is liable to contribute as an ordinary member of the company ; and, subject to the provisions contained in the regulations of the company, no contribution required from any director or manager is to exceed the amount which he is liable to contribute as an ordinary member, unless the court deems it necessary to require such contribution in order to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of the winding up. If the directors of a registered company have borrowed money which has been applied *bona fide* to the purposes of the company, and

the members or shareholders have had the benefit of the transaction, the loan constitutes a debt due from the company, in respect of which contribution may be enforced, although no express power to borrow money had been granted to the directors. (*f*) All persons who have purchased shares and received dividends (*g*), or who have applied for, and accepted and received, an allotment of shares, (*h*) or who have agreed to take shares and subscribe capital for the purpose of carrying on the undertaking, or are actually holders of shares in the company, are liable to be made contributories to the debts and liabilities of the company, whether they have executed the deed or signed the contract, or hold their shares, as trustees, * or [* 811] in their own right, or as mortgagees or creditors. (*i*) So the subscribers of the memorandum of association are bound to take as many shares as they have subscribed for, whether or not the shares are actually allotted to them, if there are shares in existence which can be attributed to them; and this objection cannot be dispensed with by the directors, (*k*) nor is it satisfied by the allotment at a subsequent period of nominally fully paid up shares. (*l*) But it does not necessarily follow that, because a man has claimed to be a member and has attended a meeting in that character, and has been registered and returned as a member by the directors, he can be made liable as a contributory to the debts of the company. (*m*) If he has offered to accept shares, but has revoked his offer before it has been accepted, and before any shares have been allotted him, he cannot be made a contributory, although shares have been subsequently allotted to him, and his name has been placed on the register of mem-

(*f*) *Elect. Tel. Co., In re*, 30 Beav. 225.

(*g*) *Barclay, Ex parte*, 27 L. J. Ch. 664.

(*h*) *Best's case*, 34 L. J. Ch. 523; *Thomson's case*, ib. 525; *Cockney's case*, 28 ib. 12; *Worth, Ex parte*, ib. 589.

(*i*) *Holt, Ex parte*, 20 L. J. Ch. 413; *Gay, Ex parte*, 21 ib. 284; *Hall's case*, 3 De G. & S. 80; *Price's case*, ib. 146; *Lumsden v. Buchanan*, 4 Macq. H. L. Cas. 959. As to liability of trustees, see *Muir v. City of Glasgow Bank*, 4 Ap.

Cas. 337; *Cunningham v. City of Glasgow Bank*, 4 Ap. Cas. 607; *Gillespie v. City of Glasgow Bank*, 4 Ap. Cas. 632; *Cree v. Somervail*, 4 Ap. Cas. 648; *Bell's case*, and other cases, 4 Ap. Cas. 547, *et seq*. As to executors, see *Buchan's case*, 4 Ap. Cas. 583.

(*k*) *Evans's case*, L. R. 2 Ch. 427.

(*l*) *Mingotti's case*, L. R. 4 Eq. 238; *Forbes & Judd's case*, L. R. 5 Ch. 270.

(*m*) *Electric Tel. Co. v. Bunn*, 29 L. J. Ch. 918.

bers and returned to the registrar. (*n*) So if he has never been a shareholder at all, and there has never been any privity between him and the company, but he has simply purchased shares in the name of another person, who has been accepted as a shareholder by the company. (*o*) So if he has accepted shares conditionally, and has been registered as a member, he is nevertheless not liable to be placed on the list of contributories, if the condition annexed to his acceptance of the shares has never been fulfilled, and he has never signed the deed of settlement or any subscription contract. (*p*) If, however, the members generally are neither party nor privy to the condition, — if, for instance, it has been a mere private arrangement by the directors behind the backs of the members, — the party cannot be relieved from the common burden of the contribution. (*q*) The register of members, therefore, is not conclusive evidence as to who are and who are not contributories, as the court can put those on the list of contributories who are not registered as members, and can strike out from the list of contributories those who are so registered. (*r*) Although there are many irregularities in the mode of transfer, and the clauses of the deed of settlement are not carried [* 812] * out, yet a transferee may, by becoming recognized and acting as a shareholder, be estopped from denying his liability as such, and his transferor may cease to be liable as a contributory. (*s*)

With respect to limited-liability companies, it has been held that the shareholders may agree *inter se* to make themselves liable to a greater amount than the amount of their shares, and may be put on the list of contributories in respect of such amount, although they are holders of fully paid-up shares. (*t*) Although the shareholder's name may have been removed from the list for years, yet if this was not done according to the terms of the deed of settlement, he is still liable to be put upon the list of

(*n*) *Graham, Ex parte*, 30 L. J. Bk. 42.

(*o*) *King's case*, L. R. 6 Ch. 196; 40 L. J. Ch. 361.

(*p*) *Wood's case*, 3 De G. & J. 91; *Irish Peat Co. v. Phillips*, 1 B. & S. 598, 629; 30 L. J. Q. B. 363.

(*q*) *Nickoll's case*, 24 Beav. 641.

(*r*) *Post*, p. * 1019.

(*s*) *Murray v. Bush*, L. R. 6 H. L. 37.

(*t*) *Maxwell's case*, L. R. 20 Eq. 885;

McKewan's case, 6 Ch. D. 447.

contributories. (*u*) As to female contributories, see sect. 78 of the Companies Act, 1862, and see *Ex parte Hatcher*, 12 Ch. D. 284; and as to bankrupts and their trustees, see *Ex parte Budden*, 12 Ch. D. 288.

Calls on Contributors constituting Specialty Debts.—The liability of any person to contribute to the assets of a company in the event of its being wound up is to be deemed a specialty debt due from such contributory to the company. (*x*) But calls founded on colonial acts create only simple contract debts. (*y*) A shareholder in a limited company who is also a creditor of the company under a contract, is not, in the event of the company being wound up, entitled to set off the debt due to him against the calls, nor to set off against the calls a dividend which may hereafter come to him; but upon payment of all calls which have become due, he is entitled to receive dividends at the same time as, and at the same rate with, the other creditors. (*z*)

Fraudulent Representations by Directors inducing Parties to become Shareholders afford no valid ground, as regards creditors, for resisting the liabilities attaching to the ownership of shares. (*a*) Parties having taken shares, and held themselves out as partners and shareholders, cannot, by repudiating their shares on the ground that they have been defrauded, make themselves no longer shareholders, and thus get rid of their liability to the creditors of a failing concern. (*b*) But although they may not be able to exonerate themselves from their liability to creditors who may have trusted the company on the faith of their being shareholders, * yet as between themselves [* 813] and the other shareholders, they may, in certain cases, successfully resist a claim to enforce a contract for the purchase of shares, by showing that they had been drawn in to accept

(*u*) *Spackman v. Evans*, L. R. 3 H. L. 171; *In re Esparto Trading Co.*, 12 Ch. D. 201.

(*x*) *Wentworth v. Chevall*, 26 L. J. Ch. 760.

(*y*) *Welland Ry. Co. v. Blake*, 30 L. J. Ex. 5; 6 H. & N. 410.

(*z*) *Grissell's case*, L. R. 1 Ch. 528; see also *In re Whitehouse & Co.*, 9 Ch. D. 595.

(*a*) *Oakes v. Turquand*, L. R. 2 H. L. 325; 36 L. J. Ch. 949; see *Houldsworth v. City of Glasgow Bank*, 5 Ap. Cas. 317; *Stone v. City Bank*, 3 C. P. D. 282, C. A. (voluntary winding up).

(*b*) *Henderson v. Royal Brit. Bank*, 7 Ell. & Bl. 364; *Daniel v. Roy. Brit. Bank*, 1 H. & N. 681; *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 145.

shares by the fraudulent representations or concealment of the directors (c) or the general body of shareholders. (d) If the directors of a company prepare a document containing a false exposition of the state of the affairs of the company for the information of their own shareholders, and one of the directors exhibits the document to strangers for whose perusal it was not intended, the other directors and the company are not bound by this unauthorized act, and are not responsible for the consequences thereof. (e) And a misrepresentation of the effect of the deed of settlement by an officer of the company will not release a shareholder if it was no part of his functions to read, or explain, or expound the deed. (f) By the Companies Act, 1867, sect. 38, every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, must specify the dates and the names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same is to be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract.

Shareholders are never relieved from being contributories on the ground that they had taken their shares on the strength of false representations made by third parties, and not by the directors who allotted them the shares. (g) And whenever they rely on fraud as shielding them from liability on the partnership contract, they ought to show that, as soon as they became aware of the deception practised upon them, they repudiated their

(c) *Roy. Brit. Bank, In re*, 30 L. J. Ch. 278; 34 L. J. Ch. 322; *Stewart's case*, L. R. 1 Ch. 574; 35 L. J. Ch. 738; *Ship's case*, 2 De G. J. & S. 544; *Reese River Co. v. Smith*, L. R. 4 H. L. 65.

(d) *Ayre's case*, 25 Beav. 513; *Glasgow Nat. Ex. Co. v. Drew*, 2 Macq. 103; *Mixer's case*, 28 L. J. Ch. 879; 4 De G. & J. 575, 583; *Bell's case*, 22 Beav. 40;

Blake, Ex parte, 34 L. J. Ch. 278; 34 L. J. Ch. 322; *Beav. 639*.

(e) *Nicol's case*, *Royal Brit. Bank, In re*, 3 De G. & J. 440; *Bigg, Ex parte*, 28 L. J. Ch. 50; *Worth, Ex parte*, ib. 589.

(f) *Sheffield's case*, 28 L. J. Ch. 325.

(g) *Duranty's case*, 26 Beav. 271.

shares, and disclaimed all farther connection with the undertaking; for if, notwithstanding the fraud, they were content to remain partners and participate in profits, or in the chances of future profits, or attempted to sell the shares, *(h)* they cannot avail * themselves of the fraud. *(i)* In a case of [* 814] fraud amongst the directors, in making it appear that they were entitled to commence business when they were not entitled to do so, there may be a defence by shareholders sought to be made contributories; but if business has been commenced, and every one of the shareholders has been made liable for a large amount to the creditors of the company, contribution to the common external liabilities cannot be resisted on the ground that the directors made a mistake or a miscalculation, and began business with less capital than they ought to have begun with. *(k)*

Every co-contractor under a subscription contract has a right to say that it was on the faith of the capital being found in the manner prescribed by that deed that he concurred in the undertaking, and to insist that every person who has signed the deed has become liable as a shareholder to the full amount of the shares for which he has signed, and should be placed on the register of the shareholders; and any underhand agreement between the directors and any particular subscriber, to the effect that he shall not be called upon, and that his subscription shall be merely nominal, and shall be used only as a bait to draw others into the scheme, is absolutely null and void. *(l)*

The promoters of a company omitted from the prospectus two contracts entered into by them which were material to be known to intended shareholders: it was held *(m)* that the contracts ought to have been specified, and *(n)* that the words "knowingly issuing," in section 38, mean intentionally issuing, although under a

(h) Briggs, *Ex parte*, L. R. 1 Eq. 483; 35 L. J. Ch. 520.

(i) Deposit Life Ass. v. Ayscough, 6 Ell. & Bl. 763; 26 L. J. Q. B. 29; Wilkinson's case, L. R. 2 Ch. 536; 36 L. J. Ch. 489; Whitehorne's case, L. R. 3 Eq. 790; Downe's case, L. R. 5 H. L. 343; Ashley's case, L. R. 9 Eq. 263; McNeil's case, L. R. 10 Eq. 503.

(k) Longworth's Executors, *Ex parte*, 29 L. J. Ch. 55; 1 De G. J. & F. 17.

(l) Davidson's case, 4 K. & J. 698.

(m) By Common Pleas Division, and by Cockburn, C. J., and Brett, L. J., diss. Kelly, C. B., and Bramwell, L. J.; see Sullivan v. Metcalfe, 5 C. P. D. 555.

(n) By Common Pleas Division, and by Cockburn, C. J., Bramwell and Brett, L. JJ.

bona fide belief that the contracts need not be specified. (o) The shareholder has a right to stand upon his contract, and if he has done all that can be demanded of him under it, he is not bound to do more, and to inquire into whether all is fair and according to the provisions of statutes; (p) but he cannot escape from his contracts or engagements by alleging that he was induced to enter into them by misrepresentation. (q)

Fraudulent Representations by Promoters.—A lease of a phosphate of lime island was contracted to be sold to an [* 815] agent for * some speculators (the promoters of the plaintiff company), and he agreed to sell it to a trustee for the plaintiff company for double the price; the speculators (promoters) and their agent suppressed the fact that they were the real vendors, and that the company was giving double the price, and inserted in the prospectus statements leading shareholders to think the contract had been approved by five directors, which was untrue, and it was held that the promoters stood in a fiduciary relation to the company, and that the contract must be set aside. (r) And where a fraudulent promoter has made a secret profit, he cannot be allowed to retain it. (s)

Shares to be paid up in Full.—By the 25th sect. of the Companies Act, 1867, it is provided that every share in any company shall be deemed to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares. (t) Any *bona fide* transaction between a company and a shareholder, which if the company brought an action against him for calls would sup-

(o) *Twycross v. Grant*, 2 C. P. D. 469; see *Gover's case*, 1 Ch. D. 182, as explained by James, L. J., in *New Sombrero Co. v. Erlanger*, 5 Ch. D. 118.

(p) *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29.

(q) *Oakes v. Turquand*, *In re Overend & Gurney*, L. R. 2 H. L. 325.

(r) *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73; 3 Ap. Cas. 1218; see *In re British Seamless Paper*

Box Co., 17 Ch. D. at p. 471; a case of a private company, and no one deceived.

(s) *Bagnall v. Carlton*, 6 Ch. D. 371; *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918.

(t) 30 & 31 Vict. c. 131, sect. 25; see *Burkinshaw v. Nicolls*, L. R. 3 Ap. Cas. 1004; *Anderson's case*, 7 Ch. D. 75; *De Ruvigne's case*, 5 Ch. D. 306; *Barrow's case*, 14 Ch. D. 432.

port a plea of payment, is "payment in cash" within the above section ; (u) but although the transaction be *bona fide*, if what is done would not support a plea of payment, there never being any liability to pay in cash, the allottee of the shares is liable to be put on the list of contributories. (x) Where shares have been allotted as fully paid up, and no contract has been registered under the above section, yet if the shares have been transferred by the allottee without notice that they are not fully paid up, to strangers, such strangers can give a good title to them as fully paid-up shares to the purchaser, even if such purchaser be the original allottee. (y)

If a company agree to pay in discharge of a debt by fully paid-up shares, they must either do so in fact, or register a contract under section 25 ; and if they do not, they are liable in damages for negligence, and the fact that the shareholder has the contract in his hands and omits to register is not, it seems, contributory negligence. (z)

*** Limitation of the Liability of Contributories.** — If [* 816] several persons unite together in a joint undertaking or partnership, and in doing so contract between themselves that no one except the managers shall be liable beyond a given amount, this, although of no effect as regards strangers, is a perfectly valid and binding provision, limiting the liability of the shareholders as between themselves ; and it is not in the power of any majority of the shareholders to bind a minority of them to any alteration of this provision. No single member of the company can, as between himself and his co-partners, be deprived of the benefit of this provision without his express consent. (a) When the deed of settlement and the contracts of the company provide for the formation of a capital fund by subscriptions and shares to meet the debts and liabilities, and declare that the directors and shareholders shall not themselves

(u) *Spargo's case*, L. R. 8 Ch. 407 ; *Australian Gold Co., ex parte Apple-
In re Barrow-in-Furness Investment Co.*, 14 Ch. D. 400. yard, 18 Ch. D. 587 ; see, however,
Houldsworth v. City of Glasgow Bank,

(x) *White's case*, 12 Ch. D. 511.

(y) *Barrow's case*, *supra*.

(z) *In re Government Security Co.*, 25 L. J. Ch. 603.
Mudford's claim, 14 Ch. D. 634 ; *Great*

5 Ap. Cas. 317 ; *post*, p. * 1177.

(a) *Bignold, Ex parte*, 22 Beav. 150 ;

be personally responsible in respect thereof, but that the fund alone shall be answerable, the shareholders cannot be called on to pay more than the amount of their several subscriptions to the capital stock, (b) unless the party dealing with the company had no notice of the limitation of liability, and contracted in ignorance thereof. (c) But the creditors are of course entitled to have the fund made available, and may enforce payment from the shareholders to the full amount of their subscriptions and shares. (d)

With respect to the liability of joint-stock banks of issue, sect. 182 of the Companies Act, 1862, is repealed by the 42 & 43 Vict. c. 76, and they are not entitled to limited liability in respect of their notes, and the members continue liable in respect thereof, as if such banks were registered as unlimited companies. And in the event of a winding up, in case the assets are not sufficient to satisfy the note-holders and the general creditors, the members, after satisfying the note-holders, shall contribute a sum equal to the amount received by the note-holders. (e)

Release of the Liability to contribute by a Transfer of the Shares.—All transfers of shares made after a winding-up order has been obtained must be shown to be *bona fide* transfers, not clothed with a trust for the benefit of the transferor, enabling him to rely on the transfer in the event of the company turning out ill, and to claim back the shares if it turns out well, (f) nor mere colorable devices for shifting the liability attaching [* 817] to the * ownership of the shares from a responsible proprietor to a man of straw. (g) If the consent of the directors is required to the transfer, that consent must be expressly or impliedly obtained. (h) If the transferee has executed the ordinary form of transfer deed, and has covenanted or agreed

(b) *Athenæum Life Ass. Soc., In re*, 4 K. & J. 549; 28 L. J. Ch. 385; *Lethbridge v. Adams*, L. R. 13 Eq. 547.

(c) *Gordon v. Sea Fire, &c. Ins. Co.*, 1 H. & N. 599; 26 L. J. Ex. 202.

(d) *Cope, Ex parte*, 20 L. J. Ch. 28; *Talbot, Ex parte*, 16 Jur. 855.

(e) 42 & 43 Vict. c. 76, sect. 6.

(f) *Chinnock's case*, 1 Johns. 717; *De Pass's case*, 28 L. J. Ch. 769.

(g) *Mexican & South Amer. Co., In re*, 27 Beav. 465; 28 L. J. Ch. 628; 30 L. J. Ch. 113; *Budd, Ex parte*, 31 L. J. Ch. 4; *Hatton, Ex parte*, 31 L. J. Ch. 340; *Electric Telegraph Co., In re*, 30

Beav. 143; 31 L. J. Ch. 4; *Gilbert's case*, L. R. 5 Ch. 559; 39 L. J. Ch. 837.

(h) *Roy. Brit. Bank, In re*, 3 De G. & J. 433.

to hold the shares upon the terms of the original deed of settlement or subscription contract, or upon the terms on which the transferor himself held them, the contribution due from him will be a specialty debt, and the company will be entitled to rank as specialty creditors upon his estate in respect thereof. (i) Where one of the rules of a mining company enabled any of the shareholders to determine their liabilities on giving notice to the purser of their desire to retire, and depositing with him a transfer of their shares, and signing a relinquishment of all claims on the company in respect of their shares, it was held that shareholders who had complied with these formalities could not be made contributories in respect of the debts and liabilities of the company. (k) But in general, a shareholder who has transferred his shares, but whose transferee has not been registered in the share register book, will be liable to be made a contributory to the company, unless the proposed transferee has acted as the owner of the shares, (l) or unless the non-registration of the transferee is owing to the default of the company. (m)

All contracts and transactions between the directors and shareholders which are to have the effect of allowing certain of the members to transfer their shares to the company and retire from the concern, without substituting the liability of any new members in their stead, apparently enabling shareholders who may have the command of money to escape from all farther liability at the expense of their co-partners, are regarded with the greatest distrust, and will in general be invalid. If the transaction is not in truth a transfer within the intent and meaning of the statutory or authorized regulations, — if, for instance, no substituted shareholder is introduced into the company, but the pretended transfer is a mere scheme between the directors and certain shareholders to enable those shareholders to withdraw from the liabilities and responsibilities of a failing concern, on giving up their shares to the company, in a mode which is not sanctioned *or provided for by the [* 818]

(i) *Hay v. Willoughby*, 22 L. J. Ch. 253. L. J. Ch. 875; *Murray v. Bush*, L. R. 6 H. L. 37; *ante*, p. * 812.

(k) *Fenn, Ex parte*, 22 L. J. Ch. 692; *Birch, Ex parte*, 28 ib. 894. (m) *Fyfe's case*, L. R. 4 Ch. 768; 38 L. J. Ch. 725; *Lowe's case*, L. R. 9 Eq.

(l) *Wrysgan Slate, &c. Co., In re*, 28 589; 39 L. J. Ch. 458.

deed of settlement, the transaction will be invalid,—and the retiring members will not be released from liability. (n) If, on the other hand, the transaction, though not in strict accordance with the mode of transfer prescribed by the deed of settlement, is, nevertheless, such a mode of transfer of shares and of retirement from the company as has been recognized, (o) and adopted and acted upon by the general body of shareholders, and is not a contrivance to enable certain shareholders, having capital, to get rid of the responsibilities attaching to holders of shares in an insolvent partnership, but is a *bona fide* compromise of a controversy between the directors and a particular shareholder with the view of enabling such shareholder to withdraw from the company, (p) the transaction cannot be treated as a void transaction; and a company is not entitled to treat a transfer as void merely because there has not been an observance of those forms and ceremonies which their own irregularity and neglect have made it impossible strictly to observe. (q) And in the case of a *bona fide* transfer, when the liability of a new shareholder is intended to be substituted in the place of a retiring member, the transaction will be upheld, if it has been recognized and adopted by the company, although it is not strictly correct in point of form. (r) If the provisions of the deed of settlement with respect to the admission of new members and shareholders have systematically been disregarded, and some new mode of making a man a shareholder has been adopted by common consent or with general acquiescence on the part of the shareholders, such new mode of admission will be binding on the company and on the party who has agreed to accept shares and become a member. (s)

If a contract in writing for the sale or transfer and acceptance of certain specified shares has been entered into, the party who

(n) *Morgan*, *Ex parte*, 18 L. J. Ch. 268; *Ex parte Lawes*, 21 ib. 690; *Ex parte Bennett*, 24 ib. 130; *Ex parte Stanhope*, 19 ib. 389; *Re Newcastle, &c.*, 24 Law T. R. 86; *Spackman's case*, 34 L. J. 8 Ch. 321; *Stanhope's case*, L. R. 1 Ch. 161; *In re Esparto Trading Co.*, 12 Ch. D. 191.

(o) *Re Brit. Prov. &c.*, 33 L. J. Ch. 92; *Brotherhood's case*, 31 Bea. 365.

(p) *Lord Belhaven's case*, 34 ib. 503; 3 De G. J. & S. 41.

(q) *Bagge*, *Ex parte*, 20 L. J. Ch. 229; *Jessop's case*, 2 De G. & J. 638.

(r) *Murray v. Bush*, L. R. 6 H. L. 37.

(s) *Walter's case*, 3 De G. & S. 156; *Bargate v. Shortridge*, 5 H. L. C. 397.

has agreed to accept the shares is liable to be placed on the list of contributories; and such a contract may operate as releasing the one party and rendering the other liable as a contributory, although no transfer deed has been actually executed and registered, and the forms necessary to complete the transfer have never been gone through. (t) If shares are transferred to a party * without his knowledge and assent, the trans- [* 819] fer is invalid, (u) and the transferee cannot, of course, be made liable to the debts of the company; but if the transferee by his acts adopts the transfer, — if he assumes to be a proprietor, and thinks fit to avail himself of the benefits and advantages of proprietorship, — he is to all intents and purposes a member of the company, and cannot avail himself of the objection that the various formalities required by the deed of settlement, to make a man a shareholder, had never been complied with. (x)

Release from Liability to contribute by Reason of a Forfeiture of Shares. — A clause that upon non-payment of calls the shares shall be *ipso facto* forfeited, operates as forfeiture only at the option of the directors. (y) But if the directors have declared a forfeiture of the shares, and had power so to do, and the power has been properly exercised, the holder of the forfeited shares, being no longer a shareholder, cannot be made a contributory. (z) But if there is a winding up of the company within a year, he will be liable to be put upon the list of past members as a contributory in respect of the forfeited shares. (a) If the forfeiture is a nullity, — as, for instance, if it has been illegally made, or if there is no clause in the deed of settlement or articles of association authorizing the forfeiture, — the shareholder will not be discharged from liability, and his name must be retained on the list of contributories. (b) But if there is a valid resolution declaring a forfeiture, it is immaterial that the name of the owner

(t) Sanderson's case, 3 De G. & S. 66; Cockburn, *Ex parte*, 20 L. J. Ch. 138; Bernard, *Ex parte*, 21 ib. 468; Yelland, *Ex parte*, ib. 582; White's case, 3 De G. & S. 157.

(u) Hennessy, *Ex parte*, 2 Mac. & Gord. 207; Griseworth and Smith's cases, 4 De G. & J. 544.

(x) Maguire's case, 3 De G. & S. 35.

(y) Bigg's case, L. R. 1 Eq. 309.

(z) Woolaston's case, 4 De G. & J. 445; 28 L. J. Ch. 721.

(a) Creyke's case, L. R. 5 Ch. 63.

(b) Barton, *Ex parte*, 28 L. J. Ch. 637; Jones, *Ex parte*, 27 ib. 668; Gower's case, L. R. 6 Eq. 77; *In re London & Prov. Coal Co.*, 5 Ch. D. 525.

has not been removed from the register, (c) or that it had never been placed upon it, (d) or that notice of the forfeiture has not been given to him. (e)

Power of Company to purchase its own Shares. — A company has in general no power to purchase its own shares. It may not do so for the mere purpose of trafficking in them and making a profit thereby; (f) but it may, under its articles or memorandum, have power to purchase for the purpose of carrying out an arrangement for the benefit of the company. (g) By the 30 & 31 Vict. c. 131, sect. 9, companies have power given to them to reduce their capital. (h)

Extent and Duration of the Liability of Outgoing and [* 820] * Incoming Shareholders. — Generally speaking, when a man comes in as a purchaser of shares in a joint-stock company, he takes them with all their rights and liabilities, so that if a liability to a loss has been incurred before he purchased, he may be called upon to contribute thereto as soon as he has accepted a transfer of shares and become a shareholder in the concern. (i) But if the deed of settlement provides that a selling member shall be absolved from future liabilities, but shall remain liable for losses already incurred, and also provides for the publication of half-yearly balance-sheets showing the half-yearly profits and losses, which balance-sheets are to be binding and conclusive on all the shareholders, unless some error be discovered in them within a certain limited period, and the partners deal with each other upon the footing of the accounts furnished, the losses to which an outgoing shareholder continues liable, notwithstanding a transfer, will, as between the members *inter se*, be those which appear on the face of such published balance-sheets. (k) No person can be settled on the list of contributories as a past member until it has been actually ascertained

(c) *Lyster's case*, L. R. 4 Eq. 233; 36 L. J. Ch. 616. (h) See *In re Dronfield Silkstone Co.*, *supra*.

(d) *Snell's case*, L. R. 5 Ch. 22.

(e) *Knight's case*, L. R. 2 Ch. 321.

(f) *Hall's case*, 5 L. R. Ch. 707;

Hope v. International Society, 4 Ch. D. 327.

(g) *In re Dronfield Silkstone Co.*, 17 Ch. D. 76.

(i) *Cape's executors*, *Ex parte*, 22 L. J. Ch. 601; *Mayhew*, *Ex parte*, 24 L. J. Ch. 353.

(k) *Holme*, *Ex parte*, 22 L. J. Ch. 228.

that the present members are unable to satisfy the contributions required to be made by them. (*l*) But when settled on the list, he is liable to contribute in respect of debts and liabilities contracted before he became a member. (*m*) The discharge of a contributory who is a member at the time of the winding up will not release him from his liability to indemnify the past member, his transferor, where the company is wound up within twelve months from the transfer. (*n*)

Liabilities of Husbands, Real and Personal Representatives, Heirs at Law, Devisees, and Assignees as Contributories.—A husband who has received dividends on shares standing in his wife's name is liable to be made a contributory, unless the shares were purchased by the wife without the participation of the husband, and the company has dealt with the wife exclusively as a married woman having a separate estate, and the question of right and liability is confined to the shareholders *inter se*. (*o*) The real and personal representatives of deceased shareholders and parties who have covenanted or agreed to subscribe a certain amount of capital to the joint stock of the company, or to take shares in a completely formed and established company, are liable to be made *contributories to the extent of [* 821] the assets in their hands, but no farther, unless the personal representatives themselves have consented to become, and have been accepted as, shareholders in their own right. (*p*) All the real estate of deceased shareholders in the hands of the heir at law or of a devisee may be charged with the liabilities of the company incurred long after the death of the shareholder, although the shares may be in the hands of the personal representatives; for if these last have no personal assets in their hands sufficient to satisfy a call made by the court, both the heir at law and the devisee must contribute in respect of the real

(*l*) Needham's case, L. R. 4 Eq. 135; (*o*) Burlinson's case, 3 De G. & S. 36 L. J. Ch. 665; Andrew's case, L. R. 3 Ch. 161; see the 25 & 26 Vict. c. 89, *parte*, 1 ib. 560; Luard, *Ex parte*, 1 De G. F. & J. 533; 29 L. J. Ch. 269.

(*m*) Helbert's case, L. R. 6 Eq. 509.

(*p*) Blakeley, *Ex parte*, L. R. 3 Ch.

(*n*) Roberts v. Crowe, L. R. 7 C. P. 629; 41 L. J. C. P. 198; Nevill's case, L. R. 6 Ch. 43; 40 L. J. Ch. 1; Hudson's case, L. R. 12 Eq. 1; 40 L. J. Ch. 444.

154; Thomas's case, 1 De G. & S. 579; Robinson's case, 20 L. J. Ch. 297.

assets received by them. The devisee, however, on being placed on the list of contributories in respect of the real estate of the testator in his hands, will have a right, as between himself and the other members of the company, to require that all the personal estate of the other members liable to contribute shall be first applied in liquidation of the debts of the company, so that the real estate in the hands of the devisee is not liable until all the available personal estate of the company and the shareholders has been exhausted. (g)

Where a shareholder, having bequeathed certain shares in a banking co-partnership to her son, and appointed her son and C her executors, died, and the two executors proved the will, and presented the probate at the office of the company, where it was entered in the books, together with the names of the executors, but the shares continued standing in the name of the deceased shareholder, and the dividends thereon were paid for many years to the son to whom they were bequeathed, and the executorship affairs were wound up except with reference to the shares in question, and the company became insolvent, it was held that the executors were liable as contributories in their character of personal representatives of the deceased shareholder. (r) There cannot be a discharge of the testator's estate but by the substitution of another person liable. (s) The trustees of the estate of every bankrupt shareholder are also liable to be made contributories in respect of the estate of the bankrupt in their hands; but they are not subjected to any personal liability by the qualified insertion of their names in the list of contributories, unless they are guilty of some plain breach of duty. (t) The order of discharge of a bankrupt shareholder is, of course, a bar [* 822] to all * calls made on him for contribution before the date of his bankruptcy. (u)

Railway Companies — Contracts Ultra Vires. — Railway companies, like registered joint-stock companies, are not entitled to

(g) *Hamer's dev.*, *Ex parte*, 21 L. J. 17 Jur. 813; *Keene's Executors*, 3 De Ch. 832; 2 De G. M. & G. 366; *Turquand v. Kirby*, 36 L. J. Ch. 570; L. R. 4 Eq. 123.

(r) *Ex parte Crosfield*, 16 Jur. 731.

(s) *Ex parte Wood*, 22 L. J. Ch. 365;

G. M. & G. 280.

(t) *Kuper's Assignees*, 3 De G. & S. 113.

(u) *Chapple's case*, 5 De G. & S.

400; *Parbury, Ex parte*, 30 L. J. Ch. 513.

engage in business not authorized by their act of parliament. Although, therefore, the act of parliament which constitutes and incorporates the company contains no prohibition against the company's engaging in any business except that of making and maintaining and using the railway, yet if all the shareholders excepting one agree to carry on a different business, that single dissentient shareholder may go to the court for an injunction. (*x*) But acquiescence on the part of those who complain of the violation of the principle will induce the court to refuse relief; they must come with diligence to assert their rights. (*y*)

Powers of the Directors.—As a general rule, the directors have no right to pledge the funds of the company for the purpose of supporting the operations of another company, or for carrying on a new trade, or for any transactions different from those they are expressly authorized to carry out. If the company has possessed itself of shares in another independent railway company, it cannot legally, if there be a single dissentient shareholder, increase the number of its shares, or apply its funds for the support of the second company. (*z*) If it has been authorized to make a railway to the banks of a navigable river, and erect thereon wharves and warehouses for the reception and storage of merchandise, and empowered to raise funds for these purposes, it cannot lawfully apply such funds when raised in deepening the river and improving the navigation thereof. (*a*) If, under separate acts of parliament, the company has power to construct branch railways in connection with its main line, and to raise capital for the purpose, it cannot lawfully apply the money raised for the construction of the branch railways to the prosecution of works on the main line. (*b*) But a railway company authorized to construct a railway on the broad gauge, may lay down rails on the narrow gauge; (*c*) and when author-

(*x*) *Att.-Gen. v. Gt. North. Ry. Co.*, 29 L. J. Ch. 798; *Hare v. Lond. & North-West Ry. Co.*, 30 L. J. Ch. 817; *Forrest v. Manchester, Sheffield, & Lincolnshire Ry. Co.*, 30 Beav. 40; *Att.-Gen. v. Gt. East. Ry.*, 5 Ap. Cas. 473. (*y*) *Graham v. Birk., &c. Ry. Co.*, 12 Beav. 466; 2 Mac. & G. 146; *Ffooks v. Lond. & S. W.*, 17 Jur. 365. (*z*) *Salomons v. Laing*, 12 Beav. 339. (*a*) *Munt v. Shrews. & Chest. Ry. Co.*, 13 Beav. 1. (*b*) *Bagshaw v. East Un.*, 2 Mac. & Gor. 389. (*c*) *Beman v. Rufford*, 1 Sim. n. s. 550; 15 Jur. 914.

ized to contract with other companies for the use of the railway, or for the passage thereon of the carriages and engines of other companies on payment of toll, may make any *bona fide* [* 823] bargains for carrying into effect the * objects authorized, however imprudent and unwise the contract may be. (*d*)

Applications to Parliament for an Extension of the Powers of the Company. — It is competent for the corporation at any time to apply to parliament to vary or extend the objects for which the company was originally incorporated, and to enter into contracts for works and services, and employ their funds in furtherance of such an object; (*e*) and it is not within the province of a court to decide on the propriety of the application, or to interfere to prevent it. But the court will in certain cases interfere to prevent a company from using its funds, and pledging its credit, and entering into contracts for the purpose of such an application. (*f*) If the act is obtained, provisions are generally inserted therein prescribing the mode in which the costs and expenses incurred in the procurement of the act are to be defrayed. These are either made a charge upon the general funds and property of the company, or upon the capital to be raised under the new act. (*g*).

Void Contracts by Chairmen of Railway Companies. — Where the chairman of the South-Eastern Railway Company promised the managing committee of a proposed Deal and Dover Railway Company that, if the committee went on with their project and applied to parliament for an act of incorporation, the South-Eastern Railway Company would, in case of the rejection of the scheme, insure the committee against loss, &c., and an action was brought against the chairman for a breach of his undertaking, it was held that the contract was void, as it was a promise that the South-Eastern Railway Company should do an act which was contrary to the public law of the country, of which law all the

(*d*) *South York. Ry. Co. v. Gt. &c.*, 16 Jur. 1035; *Ware v. Grand Junc.*, North., 9 Exch. 55; 22 L. J. Ex. 305. 2 Russ. & M. 470.

(*e*) *Bateman v. Mayor, &c. of Ashton-under-Lyme*, 3 H. & N. 323; 27 L. J. Ex. 458; see *Llanelly Ry. Co., v. L. & N. W. Ry. Co.*, L. R. 7 H. L. 550. (*g*) *Att.-Gen. v. Eastlake*, 22 Law T. R. Ch. 20; *Att.-Gen. v. Guard. South-ampt.*, 17 Sim. 6; *Att.-Gen. v. Andrews*, 2 M'N. & G. 225; *Stevens v. South*

(*f*) *Great West Ry. Co. v. Rushout*, 5 De Gex & Sm. 290; *Winch v. Birk.*, Dev. Ry. Co., 13 Beav. 59.

parties to the contract were bound to take notice. (*h*) The managing body of a railway company has no power to enter into a contract fixing and regulating the future traffic which may be carried on upon a line of railway which the company may thereafter be empowered to construct, so as to give to another railway company an interest in such traffic and profits. (*i*)

Money borrowed by Directors on Debentures.—When directors borrow money on debenture, in pursuance of the statutory power * conferred upon them, charging the [* 824] tolls or rates they are authorized to levy with the repayment of the money advanced, and not entering into any personal covenant in their own names on behalf of the company, they incur no personal liability; (*k*) but if they exceed their borrowing powers, or do not pursue the authority given to them, they may render themselves personally responsible for falsely representing that they had power to borrow the money on the credit of the undertaking and had charged the tolls or rates or funds of the company with the repayment of the money. (*l*) Where a railway company by debenture assigned to the plaintiff "the undertaking, and all tolls and sums of money" arising by virtue of their act of incorporation, to hold until principal and interest were satisfied, the principal sum to be repaid by a time specified, it was held that the last-named stipulation amounted to a covenant on the part of the company for the payment of the money. (*m*) A mortgage or bond for securing money borrowed by a railway company, according to the form in Schedule C, annexed to the Companies Clauses Consolidation Act, 1845, charges the "going concern" created by the act, and the earnings of the undertaking, but not the surplus lands of the company or the proceeds of the sale of them. (*n*) But a company

(*h*) *Macgregor v. Deal, Dover, &c.*, 18 Q. B. 618; 22 L. J. Q. B. 69. *Polhill v. Walter*, 3 B. & Ad. 124; *Chapleo v. Brunswick Building Soc.*, 6 Q. B. D. 696.

(*i*) *Midland Ry. Co. v. London & North-Western Ry. Co.*, L. R. 2 Eq. 524; 35 L. J. Ch. 31. (*m*) *Hart v. East Un. Ry. Co.*, 7 Exch. 246; *East Un., &c. v. Hart*,

(*k*) *Pontet v. Basingstoke Can. Co.*, 4 Sc. 189; *Pardoe v. Price*, 11 M. & W. 427. 8 Exch. 116; *Jackson v. N. E. Ry. Co.*, 7 Ch. D. 573.

(*l*) *Collen v. Wright*, 8 Ell. & Bl. 647; 26 L. J. Q. B. 147; 27 ib. 217; (*n*) *Legg v. Mathieson*, 29 L. J. Ch. 384; *Furness v. Caterham Ry.*, 27 Beav. 358; *Gardner v. London, Chatham, &*

may give a specific charge on the moneys to arise from the sale of its surplus lands for a debt due to the contractors who have constructed the works; (o) or a company may issue bonds or obligations binding all their "estate, property, and effects," if they are empowered to do so by their articles of association. (p) But this will be subject to the power of the directors to dispose of such property for the purposes of carrying on their business. (q)

Bonds and Loan Notes by Directors.—Directors of railway companies cannot borrow money, except in the way authorized by the special act. When they are empowered to borrow on mortgage, this is a special limited mode of borrowing, and they cannot borrow on bond or loan note so as to charge the company with the repayment of the money; but where there is a debt due to contractors in respect of work done for the company, [* 825] a bond acknowledging the debt and binding the company to pay it may be issued. (r) A railway company having no power to borrow, sold their rolling-stock to a wagon company, and agreed to pay the wagon company a rent for the use of it which would repay the wagon company the whole of the purchase-money with interest in a few years. It was held that this was in fact a borrowing, and void. (s)

Contracts in which a Director is personally interested.—No person interested in any contract with a railway company is capable of being a director, and no director is capable of being interested in any such contract; if he is either directly or indirectly concerned in any such contract, the office of such director is vacant, and he must thenceforth cease from voting and acting as a director. The contract itself is not expressly avoided; (t)

Dover Ry. Co., L. R. 2 Ch. 201; 36 L. J. Ch. 323; see *Attree v. Hawe*, 9 Ch. D. 337; *In re Herne Bay Co.*, 10 Ch. D. 42; 5 B. & S. 588.

(o) *Gardner v. London, Chatham, & Dover Ry. Co.*, L. R. 2 Ch. 201; 36 L. J. Ch. 323.

(p) *In re Florence Land Co.*, 10 Ch. D. 530.

(q) *Ib.*; see also *In re Hamilton's Windsor Ironworks*, 12 Ch. D. 707; *Hodson v. Tea Co.*, 14 Ch. D. 859. As

to uncalled capital, see *In re Colonial Trusts*, 15 Ch. D. 465.

(r) *Chambers v. Manch. & Milfd. Ry. Co.*, 33 L. J. Q. B. 268; *In re Cork & Youghal Ry. Co.*, L. R. 4 Ch. 748; *Landowners' Co. v. Ashford*, 16 Ch. D. 411; 7 & 8 Vict. c. 85, sect. 19.

(s) *Yorkshire Ry. Wagon Co. v. Maclure*, 19 Ch. D. 478; see *post*, *Void Contracts*, p. *1147.

(t) 8 & 9 Vict. c. 16, sects. 85, 86; *Foster v. Oxld., &c. Ry. Co.*, 13 C. B. 200.

but it is bad on general principles of equity, and, of course, cannot be specifically enforced. (*u*) Every director is precluded from dealing on behalf of the company with himself or a firm of which he is a partner. Having duties of a fiduciary character to discharge, he cannot enter into engagements in which his own personal interest may possibly conflict with the interests of those whom he is bound to protect. (*x*) It is an implied and inherent term of the contract or relationship subsisting between directors and shareholders, that the directors shall not make any profit to themselves out of the transactions they enter into on behalf of the company, and shall not acquire any interest adverse to their duty. (*y*)

Indemnification of Directors. — No director is liable to be sued by reason of his being a party to any contract or other instrument on behalf of the company, or, otherwise lawfully executing any of the powers given to the directors. The directors, their heirs, executors, &c., are to be indemnified out of the capital of the company for all payments made or liability incurred in respect of any acts done by them, and for all losses, costs, and damages which they may incur in the execution of the powers granted to them; and the directors for the time being may apply the existing funds and capital of the company for the purposes of such indemnity, and may, if necessary for that purpose, make * calls of the capital remaining unpaid. (*z*) [* 826] The directors are protected from liability so long only as they act within the scope of their power and authority as directors, and bind the company by their contracts. If they do not strictly pursue the powers given them, and fail to bind the company, they are in general individually responsible for the fulfilment of the engagements they have entered into (*ante*, p. * 825). They are responsible also for gross negligence and misconduct in the administration of the corporate funds and the management of the business intrusted to them, and cannot shelter themselves from the ordinary consequences resulting from breaches of trust

(*u*) *Flanagan v. Gt. Western Ry. Co.*, Ch. C. 341; *York. & North Mid. v. Hudson*, 16 Bea. 485; 22 L. J. Ch. 529; L. R. 7 Eq. 116; 38 L. J. Ch. 117.

(*x*) *Aberdeen Ry. Co. v. Blaikie*, 1 Gaskell v. Chambers, 26 Beav. 360; Macq. 461. *Parker v. McKenna*, L. R. 10 Ch. 196.

(*y*) *Benson v. Heathorn*, 1 Y. & C. (z) 8 & 9 Vict. c. 16, sect. 100.

and neglect of duty under the protecting clause of the act of parliament. They cannot be said to be lawfully executing the act when they are misbehaving themselves. (a)

Contracts between Projectors and Members of Committees of Management of Projected Undertakings. — We have already seen (*ante*, p. * 797) that, whenever a number of persons are jointly associated together and contribute labor or services, or money or goods, or house-room or apartments, in furtherance of a common design, the law raises no implied contract or promise between them, or from any one or more of them, in favor of another, for payment or remuneration for the services so rendered, or goods supplied, or for repayment of the money advanced. The services, therefore, rendered and the things done by any one member of a managing committee of a particular undertaking in the discharge of the functions of such committee, cannot be made the subject of a claim for payment or remuneration on his part as against the committee at large. The things done by him individually have been done for his own benefit and advantage, as well as for the benefit of the rest of the promoters and managers. All are presumed to contribute in some shape or another to the advancement of the joint undertaking, and the supposed superior services of one cannot be made the foundation of a claim for remuneration from another. Thus where a surveyor took an active part in the promotion of a railway company, gave notices of an intended application to parliament, and subscribed for some of the shares, it was held that he could not maintain an action against the co-projectors for work done by him and money paid in furtherance of the joint undertaking. (b) So where the inventor and patentee of a new scheme for making roads got a number of gentlemen to act as a provisional committee for the formation of a joint-stock company to [* 827] carry his scheme into effect and work * the patent, and acted as secretary to the committee, it was held that he could not maintain an action against such committee, or any of the members thereof, for his services as such secretary, or for his trouble, or for journeys undertaken by him in furtherance and

(a) See *post*, p. * 832, Negligence of Directors.

(b) *Holmes v. Higgins*, 1 B. & C. 74.

execution of the scheme, as he was himself one of the movers and instigators of the project, and the members of the committee had just as much right to charge him for their attendance and attention to his scheme, as he them for his services as secretary. (c)

Contracts for the Payment of the Projector out of the Deposits.

— Where a solicitor started a joint-stock company, and got several persons to form themselves into a committee of management, under an agreement that he would not hold any of them personally liable to him for the expenses incurred in the promotion of the project, but would pay all the expenses of promoting the company up to the time of the payment of the deposits, and would look to the deposits alone as the means of repayment, “the said deposits being held liable for that purpose by the directors of the company,” and deposits to a large amount were received, and a parliamentary contract and a subscribers’ agreement signed by the parties paying such deposits, authorizing the directors to apply them in liquidation and discharge of the expenses incurred in the furtherance of the undertaking, it was held that the projector might proceed by bill in chancery against the directors and the provisional committee for the application of the money raised by the deposits in payment of his costs and disbursements on behalf of the company, and for an injunction against their parting with the fund. (d)

Contribution between Joint Managers, Directors, and Provisional Committeemen.— Where an action was brought against four persons who had acted as managers and directors of a projected railway company, for the recovery of a debt contracted by them in the carrying out of the project, and they jointly retained an attorney to defend the action upon their own responsibility, and one of the managers was subsequently compelled by the attorney to pay more than his proportion of the joint expense of defending the action, it was held that he was entitled to an action against his colleagues to recover from them their several proportions of the over-payment by way of contribution to the common liability. (e) If all the members of a provisional com-

(c) *Parkin v. Fry*, 2 C. & P. 311.

(d) *Parsons v. Spooner*, 15 L. J. Ch. 155.

(e) *Edger v. Knapp*, 6 Sc. N. R. 707.

mittee have not joined in authorizing the same contract, the contribution is confined to those who incurred the joint [* 828] liability which has been * discharged, and in respect of which the action is brought. And to determine the share that each is to pay, regard must be had to the number of the original co-contractors; so that if twelve originally authorized the contract, and two are dead at the time the right of action for contribution arises, the survivors can only be called upon for one twelfth part each, the personal representatives of the deceased co-contractors being responsible for the residue of the contributory demand. (*f*)

Of the Rendering of Accounts and of the Appropriation of the Funds. — The managing committee of a projected undertaking are trustees for the shareholders, and liable to account to them for all moneys which have been received for the purposes of the undertaking. (*g*) One member of the committee is entitled, as against the rest, to an account of the joint property, and of the joint debts and liabilities, and to have the joint property applied in discharge of such debts. (*h*)

Contracts between a Committee of Management on the One Hand, and Subscribers and Shareholders on the Other. — The execution by a subscriber of a deed providing that a railway company is to be formed upon certain terms and conditions, and that a certain amount of capital is to be raised, a certain number of shares issued, an act of parliament obtained, and other preliminary proceedings undertaken prior to the incorporation of the company, does not, as we have already seen (*ante*, p. * 795), make the subscriber so executing the deed a partner with the projectors and managers in carrying out the undertaking. Neither does an agreement to take shares, or the acceptance of an allotment of shares, and payment of a deposit thereon, make the party who has entered into the agreement, or paid the deposit, a partner with the projectors and managers, until the prescribed capital has been raised, the shares taken, and the conditions precedent to the formation and incorporation of the com-

(*f*) *Batard v. Hawes*, 2 Ell. & Bl. 298. (*h*) *Lewis v. Billing*, 15 L. J. Ch. 425.

(*g*) *Williams v. Page*, 24 Beav. 654.

pany have been accomplished. They stand merely in the position of persons who have offered to become partners in a projected co-partnership, provided it is constituted and brought into operation *bona fide* in the mode advertised and announced, and not in the position of partners in a present partnership. (i) The promoters and projectors and members of the committee of management are consequently responsible to the subscribers and shareholders for money advanced, or goods supplied, or work done, or services rendered in furtherance of the project by any one or more of such *subscribers by [* 829] the orders, or at the request, of the members of such committee of management. (k)

Allotment of Shares.—The promoters and managers of a railway company are responsible also to a subscriber or applicant for shares who has received from them letters of allotment of shares or of an interest in the undertaking, and has paid his subscription or deposit, for the non-delivery of scrip certificates of shares pursuant to the letters of allotment and the contract in that behalf made. And it has been held that an allotment of scrip and shares in an abortive scheme, which does not correspond with the prospectus and the public advertisements of the projectors, is not a compliance with the ordinary undertaking to deliver shares. (l) A resolution by shareholders, that a certain number of shares shall be at the disposal of the managers, places them at their disposal only as trustees, to be disposed of within the scope of the functions delegated to them in the manner most beneficial to their beneficiaries. (m) The managers, in the due fulfilment of their trust, are bound to account to each shareholder or subscriber for the moneys received by them, and to apply the funds in their hands in liquidation of the debts and engagements of the company. (n)

Payment of Subscriptions and Deposits.—The managers of a

(i) *Bourne v. Freeth*, 9 B. & C. 640; 4 M. & R. 518; *Wood v. Duke of Argyll*, 7 Sc. N. R. 885; 6 M. & Gr. 928.

(k) *Colley v. Smith*, 2 M. & Rob. 96; *Caldicott v. Griffiths*, 8 Exch. 902.

(l) *Walstab v. Spottiswoode*, 4 Rail. C. 321; 15 L. J. Q. B. 198.

(m) *Pulsford v. Richards*, 22 L. J. Ch. 564; *York & North Midland v. Hudson*, 16 Bea. 485; 22 L. J. Ch. 529.

(n) *Cooper v. Webb*, 15 Sim. 454; *Cridland v. Lord de Mauley*, 17 L. J. Ch. 190; *Maitland, Ex parte*, 23 L. J. Ch. 140.

projected railway company may sue the subscribers for the sums they have agreed to subscribe, or for the deposits which they have agreed to pay, on receiving an allotment of shares, provided the covenant or contract to pay the subscription or deposit has not been obtained through the medium of any wilful and fraudulent misrepresentation or misstatement. (o) Where an allottee had applied for shares generally in a projected railway company, and undertook to accept them and pay the deposit, and the directors assigned him shares headed "not transferable," and then sued him for the deposit, it was held that he was not responsible, as his offer must be taken to have been an offer to accept and pay for transferable shares. (p)

Recovery of Deposits on the Abandonment of the Undertaking. — If the scheme has been abandoned, or has not been carried out according to the terms of the prospectus or public announcement of the projectors and managers, the subscribers who have advanced money or paid deposits on the shares [* 830] allotted to them are entitled * to recover back the amount paid, free from deductions and drawbacks in respect of the expenses that have been incurred by the managers in their attempt to bring the project to bear, (q) unless the failure or abandonment of the undertaking has been occasioned by the act or default of the plaintiff himself, or it has been expressly agreed that the money raised by subscription and deposits should be applied in liquidation and discharge of those expenses. (r) If the managers have by parol agreed to return the deposits in case an act of incorporation is not obtained, and a parliamentary contract and subscribers' agreement under seal is afterward executed, authorizing the directors to expend the deposits in defraying the necessary expenses, the first agreement is not extinguished by the subsequent contract, if the two contracts have not been

(o) *Duke v. Forbes*, 1 Exch. 356; 15 M. & W. 501; *Johnson v. Goslett*, 3 Aldham v. Brown, 29 L. J. Q. B. 33; 7 C. B. n. s. 594; 27 L. J. C. P. 122.
Ell. & Bl. 164.

(p) *Duke v. Andrews*, 17 L. J. Ex. 231. (r) *Jones v. Harrison*, 17 L. J. Ex. 132; *Garwood v. Ede*, ib. 29; *Clements v. Todd*, ib. 31; *Watts v. Salter*, 10 C. B. 477; 20 L. J. C. P. 43; *Baird v. Ross*, 25 Law T. R. 34; *Ashpittel v. Sercomb*, 5 Exch. 146.

(q) *Nockells v. Crosby*, 5 D. & R. 760; 3 B. & C. 823; *Chaplin v. Clarke*, 4 Exch. 403; *Walstab v. Spottiswoode*,

entered into by the same parties. (s) When deposits have been put into the hands of a committee with authority to deal with them in a certain way, it is not competent to any one or more, not being the whole, of the persons who have joined in giving the authority to revoke it. (t)

Misrepresentation by Committeemen and Managers.— Any material misstatement or misrepresentation concerning the actual condition of the projected undertaking, the amount of capital subscribed, and the number of subscribers or coadjutors or co-adventurers in the project, is a fraud upon those who have subscribed their money and connected themselves with the company in reliance upon the published statements, and entitles them to avoid the contract they have entered into with the projectors and managers, and recover back from them the amount of their deposits and subscriptions, unless they were cognizant of the fraud at the time they took their shares, and voluntarily made themselves parties to a bubble speculation. (u) It is therefore necessary, in preparing prospectuses of joint-stock undertakings, to state nothing on the face of the prospectus but what is strictly true. (x) In an action for the recovery of the deposit paid on an allotment of shares, on the ground that the money was obtained by fraudulent misrepresentation or by false pretences, it must be shown that the money was actually received by the parties against * whom the action is [* 831] brought, or that it was at their disposal, and that they were parties to the fraud. They are not liable for a fraudulent misrepresentation made by the secretary or solicitor of the company without their knowledge or sanction. (y)

Dissolution of Inchoate Railway and Parliamentary Works Companies — Contributories.— Persons who act together for the purpose of obtaining an act of parliament for the purpose of incorporating a railway company and making a railway, are a

(s) *Mowatt v. Ld. Londesborough*, 4 Crosshill, L. R. 10 Eq. 73 ; 39 L. J. Ch. Ell. & Bl. 9. 550.

(t) *Baird v. Ross*, 2 Macq. 61.

(u) *Wontner v. Shairp*, 4 C. B. 404 ; *Muggeridge*, 30 L. J. Ch. 242 ; 3 Law 4 Rail. C. 542 ; *Cridland v. Lord de* T. R. N. s. 651.

Manley, 17 L. J. Ch. 190 ; *Nicol's case*, (y) *Watson v. Earl Charlemont*, 12 3 De G. & J. 440 ; *Hill v. Lane*, L. R. Q. B. 856 ; 18 L. J. Q. B. 65 ; *Burnside v. Dayrell*, 3 Exch. 224. 11 Eq. 215 ; 40 L. J. Ch. 41 ; *Ship v.*

company or association within the meaning of the 25 & 26 Vict. c. 89, and may be dissolved and wound up by the court. "All the questions as to the liability of contributories to inchoate railway and parliamentary works companies, under the winding-up acts, resolve themselves into two simple questions of fact: first, Did the alleged contributory make, or authorize to be made, the contract in respect of which he is called upon to contribute on his account jointly with others? or, secondly, If any one or more entered into the contract on his own or their own behalf, did he agree to indemnify the person or persons contracting in part or in all against the consequences of that contract?" Those who are liable to pay the debts incurred in the attempt to form the company, who have given the orders, or have concurred in giving them, are the parties to be made contributories; and no one can lawfully be put on the list of contributories merely by reason of his having agreed to take, or having accepted and become an allottee of, shares, and paid a deposit. (z) A provisional committeeman who has accepted shares and paid a deposit, but has done no farther act, is not thereby rendered liable to creditors in respect of business done by order of the managers towards completing the projected undertaking, and cannot lawfully be made a contributory to the debts due to such creditors. (a) But if a provisional committee undertakes the management of the projected company, and gives orders, — if, for instance, it appoints a managing committee, and such managing committee acts under the authority of the provisional committee as their servants and agents, — all members of the provisional committee who have concurred in the proceedings and authorized debts to be incurred by the managing committee, will be liable to be made contributories to the payment of those debts. (b)

The question in every case is not merely what meet-
[* 832] ings has a * committeeman attended, but what acts has

(z) Capper, *Ex parte*, 20 L. J. Ch. 12; Clarke, *Ex parte*, ib. 14; 151; Carrick, *Ex parte*, ib. 671; Maudslay, *Ex parte*, ib. 9; Barber, *Ex parte*, ib. 146; Beardshaw, *Ex parte*, 22 ib. 18.

(a) Cottle, *Ex parte*, 2 Mac. & Gord. 214; Bright v. Hutton, 3 H. L. C. 341; 16 Jur. 695; Carmichael, *Ex parte*, 20 L. J. Ch. 12; Clarke, *Ex parte*, ib. 14; Heref. & Merth. Tid. Ry. Co., 4 Law T. R. N. s. 134.

(b) Tanner, *Ex parte*, 21 L. J. Ch. 214; Spottiswoode's case, 6 De G. M. & G. 371.

he authorized to be done. Attendance at a meeting proves in general that the party so attending is a member of the body assembled; but it proves no more. If any act is done by the meeting, the circumstances may be such as to warrant the presumption that what was done was the act of every person present. Such may be the fair inference under some circumstances; it may be a very unreasonable inference in others; and no one present at such a meeting is bound by any resolution to which he does not expressly or impliedly assent. (c) But all persons who have taken part in the management of the company, who have attended meetings of the managers, and concurred in giving orders for things to be done and for expenses to be incurred, are liable to be made contributories to the debts incurred in carrying such orders into effect; (d) and so are all persons who have authorized the managing committee to act for them, and are under an obligation to indemnify such managing committee in respect of expenses *bona fide* incurred by them (*ante*, p. * 810). All persons, also, who are associated together in the furtherance of a common object, who concur in giving orders, or impliedly authorize one another to take all the necessary steps to carry the common purpose into effect, are bound by a well-established principle of equity to bear the burthen equally, so that if one alone incurs a necessary expense in the furtherance of the joint undertaking, the others must contribute their fair share of it. (e) All persons, also, who have signed a subscribers' agreement or parliamentary contract, and have covenanted or agreed to pay a certain portion of the preliminary expenses of the project and of the application to parliament for an act of incorporation, may be properly placed on the list of contributories, although they have never received either scrip or shares. (f)

Negligence of Directors of Public Companies. — If directors of a joint-stock company receive the deposits of shareholders for a company with certain objects, and subsequently, by the memo-

(c) Roberts, *Ex parte*, 2 Mac. & Gord. 194.

(d) Pearson's Executors, 3 De G. M. & G. 252; Norbury's case, 5 De G. & S. 423; Londesborough, *Ex parte*, 23 L. J. Ch. 743.

(e) Amsinck, *Ex parte*, 25 Law T. R. Ch. 136.

(f) Bowen, *Ex parte*, 22 L. J. Ch. 857; Warwick & Worc. Ry. Co., *In re*, 27 L. J. Ch. 735.

random of association, register other and different objects, the shareholder may defend an action for calls, and obtain the cancellation of the contract in equity, and, it would seem, may, at least in cases of actual fraud, sue the directors in a court of equity for neglect of duty, and so obtain the return of the [* 833] money deposited. (*g*) *And the official liquidator, on behalf of all the shareholders, or the individual shareholders, according to circumstances, may institute a suit in equity against the directors for the purpose of compelling them to make good losses occasioned by their misconduct in the management of the company's affairs, — *e. g.* by their acting contrary to provisions in the deed of settlement, issuing false balance-sheets, paying dividends out of capital, (*h*) paying bonuses without a proper balance-sheet, or without making due allowance for risks which the company had incurred, &c. (*i*) But the directors of a company who purchased the business of an insolvent partnership composed of men possessed of real estate, are not necessarily liable for negligence in not taking mortgages on the estates of such partners, (*k*) nor for mere imprudence not amounting to *crassa negligentia*, fraud, or malfeasance. (*l*) Nor would they as a body be liable for the acts of a few of their number acting as an executive committee, who, with a view to enhance the price of the shares, bought them with the company's money, but concealed the transaction under color of a loan to third persons apparently solvent and respectable; (*m*) nor for publishing a debtor and creditor account of the company, in which they credited the company with debts as good, believing them to be such, which subsequently turned out to be bad, and issuing fresh shares at a premium on that assumption. (*n*)

If facts are proved showing it to be the duty of a joint-stock company to register the plaintiff as a shareholder, and grant him

(*g*) *Stewart v. Austin*, L. R. 3 Eq. 299; *Ship v. Crosskill*, L. R. 10 Eq. 73. (*k*) *Overend & Co. v. Gurney*, L. R. 4 Ch. App. 701.

(*h*) *Turquand v. Marshall*, L. R. 6 Eq. Ca. 112; 4 Ch. App. 376; 38 L. J. Ch. 639; see *General Exchange Bank v. Horner*, L. R. 9 Eq. Ca. 480. (*l*) *Overend & Co. v. Gibb*, L. R. 5 Eng. & Ir. Ap. 480.

(*m*) *Land Credit Co. of Ireland v. Lord Fermoy*, L. R. 5 Ch. 763.

(*n*) *Jackson v. Turquand*, L. R. 4 Eng. & Ir. Ap. 305.

(*i*) *Rance's case*, L. R. 6 Ch. App. 104.

a certificate of proprietorship of shares in the company, the company will be responsible in damages for neglecting their duty in that behalf, though no actual pecuniary damage is proved to have been sustained by the plaintiff. (*o*)

*SECTION III.

[* 834]

OF MARRIAGE.

Contracts in Restraint of Marriage¹ are void, as being contrary to the public policy of the law. (*a*) A covenant or promise, therefore, which restrains a party from marrying AT ALL, unless he marries a particular person, is null and void. (*b*) If the restraint is not to operate for an indefinite period, but only for six years, there must be reasonable grounds to restrain the party for that period. (*c*) But the law recognizes in a husband a species of interest in the widowhood of his wife, which makes it lawful for him to grant an annuity to his widow, to continue so long only as she remains unmarried. (*d*)

Marriage Brokerage Contracts,² or contracts for the payment of money, or the conveyance of property, or the performance of some act or duty, on the condition of the procurement of a particular marriage, are void, as being contrary to public policy. If, therefore, a man binds himself to pay a sum of money to another, on condition that he will bring about a particular mar-

¹ 2 Pars. Contr. 73; 1 Story, Contr. 666-669. Deed to grantor's sister to hold "so long as she shall remain unmarried," valid. *Arthur v. Cole*, 56 Md. 100.

² Marriage brokerage contracts declared void, as contrary to public policy, because tending to promote unsuitable marriages, and to diminish the influence of parents over children in the matter of marriage. *Crawford v. Russell*, 62 Barb. 92.

(*o*) *Catchpole v. Ambergate, &c. Ry.* Co., 1 El. & Bl. 120; 22 L. J. Q. B. 35. (*c*) *Hartley v. Rice*, 10 East, 23, 24. But a covenant to pay a woman a sum of money so long as she continues sole

(*a*) *Baker v. White*, 2 Vern. 215; and unmarried, is not illegal; *Gibson v. Hartley v. Rice*, 10 East, 24; *Bonfield v. Dickie*, 3 M. & S. 463.

Hassall, 32 L. J. Ch. 475. (*d*) *Lloyd v. Lloyd*, 21 L. J. Ch. 596; (*b*) *Lowe v. Peers*, 4 Burr. 2230 to *Newton v. Marsden*, 2 Johns. & H. 356; 2234. 31 L. J. Ch. 690.

riage, the instrument is void, (e) whether the condition or cause, or consideration for the bond or covenant does or does not appear upon the face of it. (f) A bond given by the husband to the wife's father to induce the latter to give his consent to the marriage, has been held to be in the nature of a marriage brokerage contract, and contrary to public policy. (g) And there is no difference between a bond to pay money and a bond to forgive a debt due, or a covenant or agreement to release an obligation, duty, or liability, as an inducement for the consent of parents and guardians. Therefore where a mother said, "You shall not have my daughter unless you will agree to release all accounts respecting my expenditure of her money," and the agreement was given, it was held to be within the mischief of a marriage brokerage contract. (h)

[* 835] * A lease granted in consideration of the procurement of a particular marriage will be set aside, and the estate discharged of the lease. (i)

Bonds and Unilateral Covenants to marry. — If a man of full age binds himself by deed to marry a woman by a day named, he is responsible for the non-performance of his bond or covenant, although the woman may not be bound by a reciprocal contract to marry him. (k) If the covenantee is ready and willing to receive the covenantor as a husband, and the latter neglects to fulfil his contract, he is liable to an action; for it is the duty of the man to go and offer himself to the woman, and not for the woman to go in search of the man. (l) A woman is also as much bound by such a deed or covenant as a man, provided it has been obtained openly and fairly, and with perfect good faith. But as women are in general peculiarly liable to be deceived and imposed upon in affairs in which their feelings are concerned, such a

(e) *Hall v. Potter*, 3 Lev. 411; *Show. P. C.* 76; 4 Br. P. C. 145, n.; 3 P. Wms. 76.

(f) *Collins v. Blantern*, 2 Wils. 347; *Arundel v. Trevillian*, 1 Ch. Rep. 47; *Drury v. Hooke*, 1 Vern. 411; *Debenham v. Ox*, 1 Ves. Sen. 276; *Smith v. Aykwell*, 3 Atk. 566; *Cole v. Gibson*, 1 Ves. Sen. 503; *Booth v. Earl of Warrington*, 4 Br. P. C. 163.

(g) *Keat v. Allen*, 2 Vern. 558; *Pre. Ch.* 267.

(h) *Hamilton v. Mohum*, 1 P. Wms. 120; 2 Vern. 652; 1 Salk. 158.

(i) *Stribblehill v. Brett*, 2 Vern. 446; 4 Br. P. C. 145.

(k) *Atkins v. Farr*, 1 Atk. 287.

(l) *Holcroft v. Dickenson*, 1 Freem. 346; *Seymour v. Gartside*, 2 D. & R. 57.

contract or engagement obtained from a woman is regarded with the greatest jealousy and suspicion, particularly where the man has entered into no corresponding engagement on his part. (*m*) If such a bond is obtained by means of any misrepresentation or concealment of the circumstances and situation in life of the party to whom it is given, it is undoubtedly fraudulent, and may be set aside. (*n*) Where a bond was given by the defendant, a single lady, which recited that a marriage had been agreed upon between her and the plaintiff, but had been deferred at her request until after the death of her father, and as a provision for the plaintiff she bound herself to give him £1200, and interest at £5 per cent, in case she should refuse to marry him on her father's death, or should intermarry with anybody else, and the lady broke her engagement by marrying a third party, it was held that she and her husband were responsible for the payment of the money. (*o*) But if a bond of this description has been clandestinely obtained from a single lady having expectations from her parent, without the knowledge of such parent, it is a fraud upon the latter, and the court, if appealed to, will set it aside. (*p*)

Contracts of Betrothment¹ are contracts between a man and a woman to marry at a future time. If a man makes an offer of marriage to a woman, the acceptance thereof by the latter may, so far as it is necessary to be proved in order to enable her to sustain an action against the man for a breach of his engagement, be * established through the medium of [* 836]

¹ Engagements to marry, see 2 Pars. Contr. (6th ed.) 60-71; Schouler, Husb. & W. Part II. c. 2; U. S. Dig. and Ann. Dig. 1870-78, tit. *Husband and Wife*, I.; Ann. Dig. 1879, &c., tit. *Husband and Wife*, II.; articles on Promises to marry, by W. A. Haggerty, 21 Alb. L. J. 327; on Breach of promise, by J. Schouler, 7 South. L. Rev. N. S. 57; Allen v. Baker, 86 N. C. 91.

Recent cases: Validity of engagement between aunt and nephew, made in Alabama, where marriage between such relatives was prohibited, but intended to be performed by a wedding in New York, where it might be lawful. Campbell v. Crampton, 18 Blatchf. 150.

Agreement to marry must be in writing, by (New York) statute of frauds, if not to be performed within a year. Ullman v. Meyer, 10 Fed. Reporter, 241; 25 Alb. L. J. 408.

(*m*) Cock v. Richards, 10 Ves. 437.

(*n*) Key v. Bradshaw, 2 Vern. 102.

(*o*) Box v. Day, 1 Wils. 59.

(*p*) Woodhouse v. Shepley, 2 Atk.

539; Drury v. Hooke, 1 Vern. 411;

Hartley v. Rice, 10 East, 22.

her conduct and actions at the time, as well as by express words. (q) If there be an express promise by the man, and it appears that the woman countenanced it, and by her actions at that time behaved herself as if she agreed to the matter, that is sufficient evidence of a promise on her side. (r) Therefore where a gentleman asked for and obtained the consent of the parents to his marriage with their daughter, and the young lady stood in the room within the hearing of the parties, and made no objection to the match, it was held that her silence afforded as cogent evidence of her assent as an express affirmative. (s)

Authentication of the Contract. — Oral engagements and promises to marry will sustain an action, unless the marriage is limited to take place upwards of a year from the making of the contract (*ante*, p. * 170). A man who was paying attentions to a girl was asked what his intentions were, and he replied, "I have pledged my honor to marry the girl in a month after Christmas;" and it was held that this declaration, taken in connection with his visits to the house, and conduct towards the girl, was sufficient evidence of a promise of marriage. (t) But a mere vague intimation by a party of his future intentions is no evidence of a promise of marriage. (u) The statute 32 & 33 Vict. c. 68, which enables the parties to an action for breach of promise of marriage to be called as witnesses, also provides that the plaintiff's evidence must be corroborated by some other material evidence in support of the promise. (x)

Time of Performance. — If the marriage is appointed to take place at a remote and unreasonably distant time, the contract would be voidable at the option of either of the parties, as being in restraint of matrimony (*post*, p. * 1139). If no time is fixed and agreed upon for the performance of the contract, it is in contemplation of law a contract to marry within a reasonable period

(q) *Harvey v. Johnston*, 17 L. J. C. P. 298. tacitement aux fiançailles." — *POTH. Mariage*, Part II. c. 1, No. 30. "Quæ

(r) *Hutton v. Mansell*, 6 Mod. 172. patris voluntati non repugnat, consentire

(s) *Daniel v. Bowles*, 2 C. & P. 553. intelligitur." — *Dig. lib. 23, tit. 1, l. 12.*

"Il n'est pas toujours nécessaire que ce (t) *Potter v. Deboos*, 1 Stark. 82.

consentement soit exprès. Lorsqu'un (u) *Cole v. Cottingham*, 8 C. & P. 75.

père fiance sa fille à quelqu'un, la fille, (x) As to what is "material evidence in support of the promise," see *Bessela v. Stern*, 2 C. P. D. 265.

after request; and either of the parties may call upon the other to fulfil the engagement, and, in case of default, may bring an action for damages. If both parties lie by for an unreasonable period, and do not treat the contract as a continuing contract, the engagement will be deemed to be abandoned by mutual * consent. The Roman law very properly con- [* 837] sidered the term of two years amply sufficient for the duration of a betrothment. (y) If the time of performance is fixed, and, by bodily disease, it becomes impossible for one party to go through the ceremony without danger to health, this is a valid ground for postponement of performance, on giving notice to the other party. (z) If either of the parties puts it out of his or her power to fulfil the contract, by marrying somebody else, there is a breach of the engagement, and a right of action at once attaches. If in such a case the contract was a contract to marry on request, no request need be made, as the defendant by his conduct has dispensed with the necessity of it, and rendered it useless. (a) So if there is a promise to marry at a fixed time, and before the time arrives one of the parties absolutely refuses to fulfil the promise, there is a breach, for which an action will lie at once. (b)

Excuses for Non-Performance.—If the party making the promise was married at the time it was made, and was consequently incapable of entering into the contract or of performing it, the incapacity constitutes no excuse for non-performance, unless it was known to the other contracting party at the time the promise was made and accepted. (c) Previous insanity and confinement in a lunatic asylum constitute no excuse for non-performance of a promise of marriage. (d) Notwithstanding a promise of marriage proved, if a man has conducted himself in a brutal or violent manner, and threatened to use a woman ill,

(y) Cod. lib. 5, tit. 1, l. 2.

(z) Hall v. Wright, Ell. Bl. & Ell. 759.

(a) Short v. Stone, 8 Q. B. 358; Lovelock v. Franklyn, ib. 378; 15 L. J. Q. B. 145.

(b) Frost v. Knight, L. R. 7 Ex. 111; 41 L. J. Ex. 78.

(c) Wild v. Harris, 7 C. B. 1004; Millward v. Littlewood, 20 L. J. Ex. 2; 5 Exch. 775.

(d) Baker v. Cartwright, 10 C. B. N. S. 124; 30 L. J. C. P. 364.

she has a right to say she will not commit her happiness to such keeping (e)

Conditional Promises of Marriage.—If a man promises to marry a woman if she will come from America to England and marry him, or will do any other particular act or thing, there is a sufficient consideration for the promise; and if the condition precedent is accomplished, — if, for instance, the voyage is performed or the act done, and the woman is ready and willing and able to be married to the man, he is responsible for the non-fulfilment of his promise. The validity of conditional promises of marriage will depend upon the reasonableness of the condition and the time limited for its accomplishment. If the marriage is to depend upon the happening of a distant and uncertain event,

which may in all probability not take place during the [* 838] lives of the parties, it would be a contract in restraint of marriage. If the condition is a lawful condition, the liability attaches as soon as the condition has been accomplished. (f) If it is stipulated that the girl shall have a certain marriage portion, or that the man shall make a certain settlement, the liability upon the contract does not attach until the condition has been accomplished. And if a reverse of fortune prevents one of the parties from fulfilling the engagement in respect of the portion or the settlement, the other is discharged.

Fraudulent Concealment of Material Circumstances — Misrepresentation and Deceit.—It is no answer to an action for a breach of promise of marriage to show that the plaintiff at the time of the making of the promise was engaged to marry some one else, and that the pre-engagement was concealed from the defendant. A party is not bound in all cases to disclose such a fact; but the concealment of it might, under certain circumstances amount to a fraud. (g) Neither is a party bound to disclose that at some previous period of his life he was of unsound mind, and had been confined in a lunatic asylum. (h) If a woman at the time of the betrothment was a woman of loose and immodest

(e) *Leeds v. Cook*, 4 Esp. 257.

(g) *Beachey v. Brown*, Ell. Bl. & Ell.

(f) *Harvey v. Johnson*, 17 L. J. 796; 29 L. J. Q. B. 105.

C. P. 298.

(h) *Baker v. Cartwright*, 10 C. B. N. S. 124.

character, and this was unknown at the time to the man who promised to marry her, the latter is entitled, as soon as he discovers her real character, to break off the engagement. General reputation of want of chastity must be established in such a case; (2) or if particular instances of misconduct are relied upon, they must be fully proved. If the circumstances, whatever they may be, were known to the other contracting party, there is then no fraud or deceit in the matter, and he has no ground for refusing to complete his engagement. (k) If false representations are made by a girl, or by her friends in collusion with her, as to her circumstances and situation in life, and the amount of her fortune and marriage portion, the fraud is an answer to any action that may be brought for a breach of the promise of marriage. (l) But if the plaintiff herself was no party to the fraud, and made no false representation, and was guilty of no wilful suppression of the truth, the defendant cannot escape from liability.

Transfer of Property by the Lady after a Promise of Marriage. — If after the mutual promises of marriage have been exchanged, the woman makes any conveyance or disposition of any *considerable portion of her property [* 839] without her intended husband's knowledge and concurrence, this is a deception upon the latter, which entitles him to withdraw from the engagement as soon as he is made aware of the circumstance. And if nothing has been said or agreed upon at the time of the betrothment respecting the settlement to be made on the marriage, and the lady insists on making a settlement of her own private fortune to her separate use, free from the dominion and control of her intended husband, the latter is entitled, if he disapproves of the arrangement, to withdraw from the contract, and to say that he will not marry her upon such terms.

Accidents and Mishaps altering the Condition of either of the Parties. — If, subsequently to the making of a contract to marry, one of the parties by bodily disease becomes unfit for the per-

(i) *Foulkes v. Sellway*, 3 Esp. 236. Bing. N. C. 54; *Bench v. Merrick*, 1

(k) *Irving v. Greenwood*, 1 C. & P. Car. & Kirw. 467.
350; *Young v. Murphy*, 3 Sc. 379; 3 (l) *Wharton v. Lewis*, 1 C. & P. 529.

formance of the most important duty of marriage, the party so unfitted is not thereby entitled to treat the contract as dissolved, the other party still desiring its performance. But the latter may break off the engagement; for if a man, by disease, accident, or mutilation, becomes impotent, he could never maintain an action against a lady for refusing to marry him. (*m*)

Abandonment of the Contract. — Parties who have exchanged mutual promises of marriage may, of course, at any time before the contract is carried into effect by the performance of the marriage ceremony, dissolve the engagement by mutual consent. *Quæ consensu contrahuntur, contrario consensu dissolvuntur.* (*n*)

Breach of Promise of Marriage.¹ — In an action for breach of promise of marriage, wherein it is laid as special damage that the defendant debauched the plaintiff and ruined her character, it would be misdirection to tell the jury that they might give her damages as a *solatium* for the injured feelings of her parents and family; but where the defendant is a person of property, they may take into their consideration not only the plaintiff's pecuniary loss in not becoming his wife, but the injury done to her future prospects of marriage, her injured feelings and affections, and the mortification she must suffer in not being able to look her family in the face. In such an action the damages cannot be measured by a known standard, as in commercial cases, but the amount is peculiarly a question for the jury; and where no witnesses were called for the defendant, and it appeared that imputations had been cast upon the plaintiff, a person

¹ Breach of promise, generally, Cord, Marr. Wom. c. 5; Schouler, Husb. & W. Part II. c. 2; U. S. Dig. and Ann. Dig. 1870-79, tit. *Husband and Wife*, I. Damages for breach, Field. Dam. c. 17; Sedgw. Cas. Dam. 757-767. Articles on Promise to marry, by W. A. Haggerty, 21 Alb. L. J. 327; on Breach of promise, by J. Schouler, 7 South. L. Rev. n. s. 57.

Recent cases: Proof, and damages, *Richmond v. Roberts*, 98 Ill. 472. Effect of offer to perform, *Kurtz v. Frank*, 76 Ind. 594. Proof of promise, and of refusal to perform, and what is the limit of time for performance, *Wagenseller v. Simmers*, 97 Pa. St. 465. Effect of proof of seduction on damages, *Kurtz v. Frank*, 76 Ind. 594; *Giese v. Schultz*, 53 Wis. 462.

(*m*) *Hall v. Wright*, Ell. Bl. & Ell. 763; 29 L. J. Q. B. 43. dence of exoneration and discharge from the contract, see *Davis v. Bomford*, 30

(*n*) *King v. Gillett*, 7 M. & W. 55; L. Ex. 139.

Poth. Tr. du Mar. No. 55. As to evi-

in humble life, and her * witnesses, which failed, and [* 840] the jury gave £2500 damages against the defendant, who was a person of property, and a new trial was asked for, simply upon the ground that the damages were excessive, the application was refused. (o) As to ratification of a promise by a minor, see *ante*, p. * 126.

Promises of Portions and Settlements.—A promise to give a girl a specific sum on her marriage, or to pay money to either the intended husband or wife, or settle property upon them, or either of them, in the event of their marrying, creates a binding obligation in the eye of the law; for “marriage is one of the strongest considerations in the law to found a contract, gift, or grant.” (p) But the promise must be made by a person of full age, and must not be the expression of a mere desire or wish to make a settlement. (q) It must also be authenticated, as we have before seen, by a note in writing, signed by the promisor or his agent. (r) If, therefore, the husband, prior to the marriage, gives a verbal promise to the wife that he will settle her property upon her, she has nothing to rely upon but his honor; and if after the marriage he breaks his word, she has no remedy against him. (s) Subsequent marriage is not part performance of a parol contract in consideration of marriage, nor will acts of part performance by the party sought to be charged prevent the operation of the statute. (t) But if a husband writes a letter promising to make a settlement upon his intended wife, or a father by a letter promises “to give such a fortune with his daughter to one who shall marry her,” this is a sufficient compliance with the requirements of the statute. But the promise must be an absolute promise, and not dependent upon conditions and contingencies remaining unaccomplished. (u) Where a per-

(o) *Berry v. Da Costa*, L. R. 1 C. P. L. J. Ch. 157; *Caton v. Caton*, L. R. 2 331; 35 L. J. C. P. 191. H. L. 127; 36 L. J. Ch. 886.

(p) *Laver v. Fielder*, 32 Beav. 1; 32 L. J. Ch. 365. (s) *Montacute v. Maxwell*, 1 P. Wms. 620; *Caton v. Caton*, L. R. 1

(q) *Beaumont v. Carter*, 32 Beav. 586; *Moorhouse v. Colvin*, 15 Bea. 341. Ch. 137; 35 L. J. Ch. 292; but see *Williams v. Williams*, 37 L. J. Ch. 854.

(r) *Ante*, p. * 169; *Randall v. Morgan*, 12 Ves. 73; *Bawdes v. Amhurst*, 35 L. J. Ch. 292.

Pr. Ch. 404; *Barkworth v. Young*, 26 (u) *Bird v. Blosse*, 2 Ventr. 361;

son by writing promised, as a mark of esteem and friendship to a young man, that he would allow him £500 a year, and at his death bequeath him £10,000, and this writing was shown to the parent of a young woman, who thereupon gave consent to the marriage, it was held to be a mere *nudum pactum*, for that there was no connection between the promisor and the parent. (x)

Ante-Nuptial Settlements by Women engaged to be married may be made with the knowledge and concurrence of [* 841] the intended * husband. If the woman is in trade, she may convey her stock-in-trade to trustees, to enable her to carry on the business separately from the husband; and if the latter does not intermeddle with the business, the stock-in-trade will not be liable to be seized for his debts. (y) If the woman is a minor, no deed executed by her without the sanction and authority of the Lord Chancellor can bind her, nor can she confirm or ratify the deed after she comes of age, (z) although the deed, if executed by her husband, will be binding upon him. If she neglects to inform her intended husband of her intention to make the settlement, it will in general be considered to have been made in fraud of his marital rights; and the court will set it aside. (a) A settlement made by a widow of certain property upon the children of a former marriage, during the pendency of a treaty for a second marriage, is fraudulent and void as against the second husband, if he was not informed of the circumstance prior to the celebration of the nuptials. (b) But if a widow has done nothing more than make a fair and reasonable provision for her children, such as every mother in her situation would morally be bound to make, it has been said that there is no fraud in the case, and no ground for setting aside the settlement. (c) If

Moore v. Hart, 1 Vern. 110; Alt v. Alt, 4 Giff. 84; 32 L. J. Ch. 52.

(x) Dashwood v. Jermyn, 12 Ch. D. 776.

(y) Jarman v. Woolloton, 3 T. R. 618; Haslington v. Gill, 3 Doug. 415; Dean v. Brown, 8 D. & R. 95; 5 B. & C. 336; settlements of goods and chattels require registration; Fowler v. Foster, 28 L. J. Q. B. 210.

(z) 37 & 38 Vict. c. 62, sect. 2.

(a) Howard v. Hooker, 2 Ch. R. 44;

Lance v. Norman, ib. 41; Prideaux v. Lonsdale, 1 De G. J. & S. 433; Downes v. Jennings, 32 Beav. 290; 32 L. J. Ch. 643; Carleton v. Earl of Dorset, 2 Vern. 17; Goddard v. Snow, Russ. 485; Chambers v. Crabbe, 34 Beav. 457.

(b) England v. Downs, 2 Beav. 529.

(c) Hunt v. Matthews, 1 Vern. 408; Doe v. Lewis, 11 C. B. 1035; but see per Romilly, M. R., Downes v. Jennings, 32 Beav. 290; 32 L. J. Ch. 643, 646.

the settlement has been made prior to the treaty of marriage, there is no ground for impeaching it. And if during the betrothment the woman announces her intention of making the settlement to her intended husband, and the nuptials are celebrated, the settlement will stand good. (d) A husband has no right to disturb a secret settlement made by the wife pending the treaty for the marriage, provided he has by his conduct before marriage put it out of the power of the wife effectually to make any stipulation for the settlement of her property, by rendering retirement from the marriage on her part impossible. Thus where a man seduced a girl during the betrothment, and brought her to his house to cohabit with him, and the girl during the cohabitation made a settlement of her own fortune to the separate use of herself for life, with remainder to her children in equal shares, to the exclusion of any future husband, and was subsequently married to the man with whom she *had cohabited, the court refused to set aside the settlement, saying that the woman committed no fraud upon the husband if, when placed under such circumstances, she took the only means she had left her of protecting herself. (e)

Ante-Nuptial Settlements by Intended Husband and Wife.—Property intended to be settled is generally, prior to the marriage, conveyed to trustees, to be holden by them either for the separate use of the wife, free from the control of the husband, or for the use of the husband and wife jointly, and subsequently of the children of the marriage, with ultimate limitations and provisions, in case there should be no issue. All ante-nuptial settlements made *bona fide* in contemplation of the marriage, are good, both against the husband and his creditors, and all subsequent purchasers of the property settled. (f) Therefore whenever it is wished to secure a provision for the wife and children which shall remain unaffected by the subsequent insolvency of the husband, the arrangements should be made before marriage, as great difficulties are likely to interpose themselves in the way

(d) *Strathmore v. Bowes*, 2 Cox, 34; 2 Br. C. C. 350; *St. George v. Wake*, 1 Myl. & K. 617; *Cotton v. King*, 2 P. Wms. 674; *Blithe's case*, 2 Freem. 91.

(e) *Taylor v. Pugh*, 1 Hare, 608, 616.

(f) *Campion v. Cotton*, 17 Ves. 263.

of an effectual settlement after marriage. If a general power of revocation is reserved in a settlement of realty, or if the exercise of such a power is made to depend upon the consent of persons under the influence and control of the husband, the settlement cannot be supported against creditors nor against subsequent purchasers (see Add. on Torts (5th ed., by Cave), p. 220, *et seq.*). If the husband reserves to himself the power of charging the land to "the full value," this reservation is tantamount to a general power of revocation, and invalidates the settlement. (*g*) But powers to sell and exchange lands, and re-invest moneys and securities with the consent of trustees, and the usual powers of charging lands to a moderate amount, given *bona fide*, will not defeat the settlement. If a settlement is made by parties intending to marry, and who afterward marry, the settlement cannot be revoked before marriage by the intended husband and wife without the consent of the trustees and all the parties to the settlement. (*h*) A marriage settlement made in London in the Scotch form by parties intending to be married, one of whom is at the time domiciled in Scotland, will be construed in England according to the law of Scotland. (*i*) If the marriage on which the settlement is founded is void, the settlement is void likewise. (*j*)

Marriage Settlements by Infants.— If both the parties to a marriage settlement are infants, the settlement is entirely nugatory, * unless it has been made under the sanction and with the authority of the Lord Chancellor, pursuant to the provisions of the 18 & 19 Vict. c. 43; nor can the parties confirm the settlement after they come of age. (*k*) If the female party is under age, all the general personal estate of the female infant comprised in the settlement will be bound thereby, because it becomes by the marriage the absolute property of the husband; but the real estates of inheritance of the female infant are not bound by the settlement, as she has no power of disposition over them during her minority. If she

(*g*) *Tarback v. Marbury*, 2 Vern. 510. acquired property, see *Gray v. Stuart*,

(*h*) *Page v. Horne*, 17 L. J. Ch. 200. 30 L. J. Ch. 884.

(*i*) *Duncan v. Canaan*, 23 L. J. Ch. 65. (*j*) *Chapman v. Bradley*, 33 Beav 265. As to covenants to settle after-

(*k*) 37 & 38 Vict. c. 62, sect. 2.

survives the husband, her power over her real estate is the same as if no settlement had ever been made. If the husband survives, he holds such real property for his life, if he had issue by the wife born during the coverture which might by possibility inherit the estate as her heirs; and on his death it descends to the wife's heir at law, whatever may be the terms and provisions of the settlement. (*l*) The 18 & 19 Vict. c. 43, renders valid a post-nuptial settlement of an infant's estate made with the approbation of the Court of Chancery. (*m*) Where a woman marries while an infant, the land which she has in fee simple or leasehold property being settled estate under the Conveyancing and Law of Property Act, 1881, (*n*) her trustees stand possessed of the accumulated fund arising from income of the land and from investments of income in trust for her separate use independently of her husband.

Settlements of After-Acquired Property. — A covenant by the husband alone to settle all property which may accrue to the wife during coverture does not extend to property left to the wife to be at her absolute disposal, free from the control of her husband. (*o*) But if the wife, or the husband and wife, before marriage, have entered into a covenant of this description, the husband is responsible for its fulfilment, and such a covenant may be specifically enforced; (*p*) but it does not bind property settled to the separate use of the wife, so that she has no power of disposition over it, (*q*) nor property bequeathed to husband and wife jointly. (*r*) And if the covenant to settle the after-acquired property of the wife is on the part of the husband only, the wife is not bound by it. (*s*) Such a covenant is construed to apply only to property acquired during the coverture, although the words "during the coverture" are not inserted in the covenant. (*t*)

(*l*) *Simson v. Jones*, 2 Russ. & M. 376; *Trollope v. Linton*, 1 Sim. & Stu. 485; *Stamper v. Barker*, 5 Mad. 164; *Milner v. Ld. Harewood*, 18 Ves. 259. (*q*) *Coventry v. Coventry*, 32 Beav. 612.

(*m*) *Powell v. Oakey*, 34 Beav. 575. (*r*) *Edye v. Addison*, 1 H. & M. 781; 33 L. J. Ch. 132.

(*n*) 44 & 45 Vict. c. 41, sects. 41, 42 (5). (*s*) *Young v. Smith*, L. R. 1 Eq. 180; *Ramsden v. Smith*, 2 Drew. 302. 35 Beav. 87.

(*p*) *Milford v. Peile*, 2 W. R. 181; (*t*) *Carter v. Carter*, L. R. 8 Eq. 551;

[* 844] * **Post-Nuptial Settlements** by the husband of his own property, or by the husband and wife of the wife's property, are valid as between the parties to them; (*u*) but they will not prevail over the claims of subsequent purchasers of the settled property, although they bought with knowledge of the settlement, (*x*) unless it has been made pursuant to an agreement in writing, (*y*) entered into with the wife, or her guardians, prior to the marriage, or unless the husband has surrendered his interest in the wife's estate for the sole and exclusive benefit of the wife during coverture. (*z*) Nor will they prevail over the claims of creditors, if it appear that the husband was largely indebted at the time he made it. (*a*) If the debt of a creditor by whom a voluntary settlement is impeached, existed at the date of the settlement, and it is shown that his remedy is defeated or delayed, it is immaterial whether the debtor was or was not solvent after the making of the settlement. But if a voluntary settlement is impeached by a subsequent creditor whose debt was not contracted at the date of the settlement, it must be shown that the necessary result of the settlement was to delay, hinder, and defraud the creditors, in which case the law will infer that the settlement was made with that intent; (*b*) and although a husband may not be in debt at the time he makes the settlement, yet if the settlement is made long after marriage, and not in pursuance of any agreement to make a settlement prior to the marriage, nor in consequence of an accession to the wife's fortune, and the husband becomes indebted to any considerable extent immediately afterward, the settlement would be considered fraudulent. But it will be otherwise if the husband received property from the wife at the time of the marriage, and made the post-nuptial settlement as a fair and

39 L. J. Ch. 268; *In re Edwards*, L. R. 9 Ch. 97.

(*u*) *Merryweather v. Jones*, 4 Giff. 503.

(*x*) *Gooch's case*, 5 Co. 60 a; *Evelyn v. Templar*, 2 Br. C. C. 148; *Doe v. Manning*, 9 East, 59; *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Buckle v. Mitchell*, ib. 110; *Johnson v. Legard*, 6 M. & S. 60; *Peter v. Nicolls*, L. R. 11 Eq. 391.

(*y*) *Goldicutt v. Townsend*, 28 Beav. 445.

(*z*) *Hewison v. Negus*, 22 L. J. Ch. 955; *In re Foster and Lister*, 6 Ch. D. 87.

(*a*) *Took v. Tuck*, 12 Moore, 435; *Townsend v. Windham*, 2 Ves. Sen. 11.

(*b*) *Freeman v. Pope*, L. R. 5 Ch. 538; 39 L. J. Ch. 689; *Bolland, Ex parte*, L. R. 7 Ch. 24.

equitable provision for her, he being at the time in solvent circumstances; (c) or if the settlement contains a provision for the payment out of the settled property of the husband's debts. (d). If the husband after marriage conveys his furniture, stock, and movables to trustees, for the use of his wife and children, and remains, notwithstanding such conveyance, the apparent possessor * and owner of the property, the conveyance [* 845] so made is *prima facie* a fraud as regards creditors. (e)

But the possession by the husband and wife of property, stock-in-trade, and furniture limited to the separate use of the wife before marriage, is no badge of fraud, and does not render it liable to be seized for the husband's debts. (f) Where an attorney, being in insolvent circumstances, assigned the good-will of his business in consideration of a sum of money paid down, and an annuity, secured by bond, to be paid to his wife for life, with remainder to himself for life, it was held that the settlement of the annuity was void as against creditors. "This," observes Wood, V. C., "is in effect a contract by which the debtor is making sale of his property by means of a covenant that he will abstain from carrying on business, and taking a settlement of the purchase-money upon his wife for life for her separate use, with the immediate remainder to himself for life, the whole object plainly being to obtain the benefit of the entire property for his own use and advantage." (g) An ante-nuptial settlement is voluntary so far as it is made in favor of collaterals. (h)

Post-Nuptial Settlements in Fulfilment of an Ante-Nuptial Contract in Writing (i) will prevail against the claims both of creditors and purchasers. (k) And so also will a settlement

(c) *Re Hanlon*, 23 Law T. R. 212; *Haslington v. Gill*, ib. 620, n.; 3 Doug. Lush v. Wilkinson, 5 Ves. 384; *Battersbee v. Farrington*, 1 Swanst. 106; *Holloway v. Millard*, 1 Mad. 419; *Nunn v. Wilmore*, 8 T. R. 529.

(d) *George v. Milbanke*, 9 Ves. 194. (g) *Neale v. Day*, 28 L. J. Ch. 45; *French v. French*, 6 De G. M. & G. 102.

(e) See Add. on Torts (5th ed., by Cave), p. 223; *Arundel v. Phipps*, 10 Ves. 139. (h) *Smith v. Cherril*, L. R. 4 Eq. 390; 36 L. J. Ch. 738.

(f) *Jarman v. Woolloton*, 3 T. R. 196. (i) *Goldicutt v. Townsend*, 28 Beav. 445.

(k) *Dundas v. Dutens*, 1 Ves. Jun. 618; *Cadogan v. Kennett*, 2 Cowp. 436;

made by the husband in consequence of the relinquishment by the wife of her jointure, or dower, or property over which she has a power of disposition or appointment, (*l*) or made in consideration of a new portion, or addition to her portion, to be given to the wife by her relations. (*m*) But the amount and value of the property so settled must not be greatly disproportioned to the value of the consideration received by the husband, or the transaction will, if the husband is indebted at the time, or shortly afterward becomes insolvent, be considered fraudulent, and the husband's creditors will be let in. A wife may contract in equity with her husband for a post-nuptial settlement upon her of her own property for a valuable consideration, and the husband may be a purchaser from the wife where property belonging to her is the subject of the settlement, so that [* 846] if the settlement is a bargain for value * between the husband and wife, it is sustainable against creditors. (*n*) The 18 & 19 Vict. c. 43, renders valid a post-nuptial settlement of an infant's estate, made with the approbation of the Court of Chancery. (*o*)

Of the Wife's Right to a Post-Nuptial Settlement.— If after the marriage the wife is unable to live with the husband in consequence of his misconduct, she has a right, as against him, to have her own property and unrecovered *choses in action* settled upon her. (*p*) She has a right, also, in certain cases, to a settlement upon her of her own property as against the assignees of the husband in bankruptcy, and even against a particular assignee claiming under an assignment from both the husband and wife for a valuable consideration. (*q*)

Contracts in Fraud of Settlements and Promises of Marriage Portions.— Any private underhand agreement or treaty entered into for the purpose of infringing or defeating an open, public

(*l*) *Ward v. Shallett*, 2 Ves. Sen. 17; *Anon.*, Pre. Ch. 102; *Cottle v. Fripp*, 2 Vern. 220. (*n*) *Hewison v. Negus*, 22 L. J. Ch. 655; *Harman v. Richards*, ib. 1066.

(*m*) *Rassel v. Hammond*, 1 Atk. 13; ib. 190; *Colville v. Parker*, Cro. Jac. 158; *Ramsden v. Hylton*, 2 Ves. Sen. 308; ib. 18; *Jones v. Marsh*, Cases Eq. 603; *Dunkley v. Dunkley*, 2 De G. Mac. & G. 390; *Re Kincaid*, 22 L. J. Ch. 395.

(*o*) *Powell v. Oakley*, 34 Beav. 574. (*p*) *Barrow v. Barrow*, 24 L. J. Ch. 198. (*q*) *Scott v. Spashett*, 3 Mac. & Gord. 603; *Dunkley v. Dunkley*, 2 De G. Mac. & G. 390; *Re Kincaid*, 22 L. J. Ch. 395.

agreement, made in consideration of marriage, is fraudulent and void. (r) A bond, for example, given by the husband to return part of his wife's marriage portion, without the privity of his own parents and guardians, and of all the parties to the treaty of marriage, is fraudulent and void, and cannot be enforced against him. If the father, or any other relation or friend of the husband or wife, who has agreed to make a settlement of property upon one or both of them on their marriage, or to give a marriage portion to the wife, takes a bond or covenant from either the husband or wife, or both of them, to repay the whole or any part of such marriage portion, or to re-convey an estate granted or intended to be granted, the contract is void, as being a fraud upon the parties to the treaty of marriage, and upon the parents and guardians who had a right to give or withhold their consent to the marriage. (s)

If the relations of a woman furnish her with money, in order that she may appear to have a considerable marriage portion, and secretly take from her a bond or covenant to repay the money advanced after her marriage, the bond is void. (t) So if a relation or friend of the husband advances him money, or clothes him with the apparent possession of property, to enable him to * make a show of wealth in order to obtain a [* 847] corresponding portion with his wife, and takes from such husband a bond or covenant for the repayment of the money advanced, or the surrender of the property intrusted to him, the bond or covenant will be void, and the husband will be entitled to hold the property for his own use, notwithstanding that he was himself a party to the deceit. (u) Where a widow, on the marriage of her son, agreed with the intended wife's relations to make a settlement on him and his wife and the children of the marriage, of certain lands which she had in jointure, but she at the same time obtained a secret agreement from her son to pay her an annuity, it was held that this agree-

(r) *Kemp v. Coleman*, 1 Salk. 156; *Cox*, 367; *Palmer v. Neave*, 11 Ves. 247; *Turton v. Benson*, 2 Vern. 764; *Pitcairn* 165; *Morrison v. Arbuthnot*, 8 Br. P. C. 346; *v. Ogbourne*, 2 Ves. Sen. 380; 1 Ves. 247; 1 Br. Ch. C. 548, n. Sen. 277.

(t) *Gale v. Lindo*, 1 Vern. 475.

(s) 1 Eq. Abr. 88 (E, 3); *Peyton v. Bladwell*, 1 Vern. 240; *Scott v. Scott*, 1 346; *Webber v. Farmer*, 4 Br. P. C. 170.

(u) *Thompson v. Harrison*, 1 Cox,

ment was fraudulent and void. (x) If a man about to be married is largely indebted, and a relation comes forward and pays off his debts in order to enable him to gain the consent of the parents of the lady to the match, and at the same time takes a bond from the lady and her intended husband to pay him a certain sum within a specified period from the celebration of the nuptials, the bond is a fraud upon the parents, and the husband and wife are entitled, after the marriage, to set it aside, although they were both parties to the fraud. (y)

Joseph Montefiori being engaged in a treaty of marriage, his brother Moses, to assist him in his designs and represent him as a man of fortune, gave him a note for a large sum of money, as the balance of accounts between them, which balance he (Moses) acknowledged to have in his hands, though in truth no such balance nor anything like it existed. After the marriage had been celebrated, Moses reclaimed the note as having been given without consideration; but the court held that Joseph was entitled to the note, and that Moses should not be permitted to take advantage of his own fraud, although his brother was in collusion with him. (z) Upon the same principle, creditors who conceal, wholly or in part, debts due to them from a man about to be married, and represent that he is not indebted, or is only indebted to them to a less amount, in order to serve the turn of their debtor and get the parents of the woman to consent to the marriage, will be bound by such fraudulent representations, and will be barred from all remedy for obtaining payment of their debts, just as effectually as if they had executed a release under seal. (a)

[* 848] * **Effect of Adultery on Marriage Settlements.** — If a marriage settlement is valid when executed, the wife does not, according to the common law, lose by reason of adultery any benefit the settlement confers upon her; (b) but the

(x) *Lamlee v. Hanman*, 2 Vern. 466, 499.

(y) *Redman v. Redman*, 1 Vern. 347.

(z) *Montefiori v. Montefiori*, 1 W. Bl. 363; *Money v. Jorden*, 21 L. J. Ch. 531; *Maunsell v. White*, 22 Law T. R. H. L. 293.

(a) *Nevill v. Wilkinson*, 1 Br. Ch. 543; *Eastabrooke v. Scott*, 3 Ves. 460;

16 Ves. 125.

(b) *Evans v. Carrington*, 30 L. J. Ch. 364.

20 & 21 Vict. c. 85, sect. 45, enables the Divorce Court, when it has pronounced sentence of divorce by reason of the adultery of the wife, to deal with the settled property of the wife. (c)

Costs of Marriage Settlements. — The usage of the profession is "that the lady's solicitor shall prepare the settlement, and that the gentleman shall have the privilege of paying for it." (d)

The Marriage Contract, its Nature and Requisites.¹ — Marriage, as understood in Christendom, is the voluntary union for

¹ Concerning the manner in which competent parties may enter into a valid marriage contract, consult Bish. Marr. & Div. (6th ed.); 2 Pars. Contr. (6th ed.) c. 10, sect. 4; Reeve, Dom. Rel. (3d ed.) c. 15; Schouler, Husb. & W. Part II. c. 1; Tyler, Inf. & Cov. c. 38; Noble's Compend. State Laws, Marr. & Div. c. 2; U. S. Dig., and Ann. Dig. 1870-1878, tit. *Husband and Wife*, II.; Ann. Dig. 1879, &c. tit. *Husband and Wife*, I.; Van Voorhis v. Brintnall, 86 N. Y. 18.

There is a well-known conflict in the decisions of the various States on the question how the marriage relation may be formed, some of the States requiring that certain forms shall be observed, — that a priest or magistrate shall attest the consent of the parties, or the like; while other States treat actual present consent as sufficient to constitute marriage, and prefer to enforce any positive requirements of form by penalties, not by adjudging the marriage void. The latter policy prevails in Alabama, California, Georgia, Illinois, Iowa, Michigan, Minnesota, Mississippi, Missouri, New York, Ohio, Pennsylvania. Their laws require, to the validity of a marriage, only actual present consent between the parties, and some of the decisions seem to allow the relation to be formed by words of promise followed by cohabitation. *Campbell v. Gullatt*, 43 Ala. 57; *Re McCausland's Estate*, 52 Cal. 568; Cal. Civ. Code, sects. 55-57, 75; *Askew v. Dupree*, 30 Ga. 173; *Port v. Port*, 70 Ill. 484; *Blanchard v. Lambert*, 43 Iowa, 228; Iowa Civ. Code, sects. 2195, 2199; *Hutchins v. Kimmell*, 31 Mich. 126; *State v. Worthingham*, 23 Minn. 528; *Floyd v. Calvert*, 53 Miss. 37; *Dyer v. Brannock*, 66 Mo. 391; *Hynes v. McDermott*, 82 N. Y. 41; *Carmichael v. State*, 12 Ohio St. 553; *Richard v. Brehm*, 73 Pa. St. 140. The laws and decisions of Connecticut, Delaware, Kentucky, Maine, Maryland, Massachusetts, North Carolina, and Tennessee prescribe certain preliminaries or a ceremony, and unless the requirement is substantially obeyed, there is no marriage. *State v. Hodgskins*, 19 Me. 155; *Denison v. Denison*, 35 Md. 361; *Commonwealth v. Munson*, 127 Mass. 459; *State v. Samuel*, 2 Dev. & B. L. 177; *Thompson & Stegers*, Tenn. Stat., Art. *Marriage*, note, 1099; see also Gen. Stat. Conn. tit. 14, c. 1, sect. 5; Del. Code, c. 74, sect. 2; and Gen. Stat. Ky. c. 52, Art. I. sect. 2.

The following cases are selected as illustrating the application of these opposed views, under various circumstances.

In a suit brought by grandchildren to recover property belonging to their grandfather, the proof offered of his marriage was that no clergyman or justice was called, but that the grandfather and the woman afterward reputed as his wife stood up one evening in the parlor of the boarding-house and joined hands, when

(c) *Stone v. Stone*, 3 S. & T. 372; (d) *Helps v. Clayton*, 17 C. B. N. S. Laurence v. Laurence, ib. 207; and see 553; 34 L. J. C. P. 1. the 23 & 24 Vict. c. 144, sect. 6.

life of one man and one woman, to the exclusion of all others. (e)
The marriage contract itself is founded on the consent of the

the brother of the woman formally announced to the household present that the pair had agreed to marry, to which they both bowed assent. They afterward lived as married. *Held*, a valid marriage, to sustain rights of descent. *Dyer v. Brannock*, 66 Mo. 391, reversing 2 Mo. App. 432.

On a question as to the legitimacy of a child, it appeared that her parents had been intimate in the way of courtship for nearly a year before her birth; that they intended to be married; that the father, a seafaring man, was detained on a voyage longer than he expected; that the child was born a few days before his return, and that her parents were shortly after married by a clergyman, and subsequently cohabited as husband and wife for many years. *Held*, sufficient to warrant a jury in finding that a marriage in fact existed previous to the child's birth. *Starr v. Peck*, 1 Hill (N. Y.), 270; see however, disapproval in *Caujolle v. Ferrie*, 26 Barb. 177.

A man and woman being engaged to be married, the former wished to waive the ceremony, and finally persuaded the woman to consent so to do. Shortly afterward, while riding together in a carriage, he placed a ring upon her finger, saying: "This is your wedding-ring; we are married. I will live with you and take care of you all the days of my life, as my wife." She assented to this, and they went to a house where he had previously engaged board for "himself and wife," where they lived together as man and wife for about five weeks. *Held*, in her suit for a divorce, that this was a valid marriage. *Bissell v. Bissell*, 55 Barb. 325.

In a prosecution for bigamy, the case as to second or alleged bigamous marriage was that defendant, not intending a marriage, but meaning to cheat the woman by a mock wedding, brought to her residence a man whom he represented to be a minister, and who was dressed as one, who performed the Protestant Episcopal marriage ceremony for the parties, the woman making the responses in good faith; and that they afterward lived together as man and wife. *Held*, that these facts constituted an actual marriage, such as would sustain an indictment for bigamy, if the accused had at the time a wife living. Whether the person represented to be a minister was one or not, was unimportant. *Hayes v. People*, 25 N. Y. 390, 15 Abb. Pr. 153.

In ejectment by plaintiff's claiming as the widow and sons of one who died seised of lands, the proof offered of her marriage showed only an oral contract in the present tense, avowed before witnesses, first in London, again on board ship while crossing the Channel, and a third time in Paris. *Held*, sufficient to show a valid marriage. By the law of New York, a man and a woman without going before a minister or a magistrate, without the presence of any person as a witness, with no previous public notice given, with no form or ceremony, civil or religious, and with no record or written evidence of the act kept, and merely by words of present contract, may take upon themselves the relation of husband and wife. *Hynes v. McDermott*, 82 N. Y. 41, 7 Daly, 513.

Per contra: In a suit by a woman claiming a share of a deceased man's estate as his widow, there was no proof of a marriage license or ceremony, as required by the local law; but the plaintiff alleged that she and the decedent were married by private contract, and had frequently acknowledged each other as husband and wife, both in California and Oregon, and on one occasion when they were taking a sea

(e) *Hyde v. Hyde*, L. R. 1 P. & M. 130; 35 L. J. P. & M. 57.

parties, and ranges amongst that class of contracts called consensual contracts. Consent of parents and guardians was, by

voyage together from one State to the other. It was contended that, even if the law prescribing forms of marriage prevented the operation of the contract formed on the land, it was local in its effect, and did not extend to the high seas. *Held*, that the proof was insufficient. *Holmes v. Holmes*, 1 Abb. U. S. 525.

Upon a trial for murder, a woman was offered as a witness for the State who stated that she and the defendant agreed to marry; that he told her he could get no license at that time, because "all the old licenses had run out," that as soon as the new licenses came in, he would procure one and marry her; and that upon this agreement they cohabited. *Held*, that there was no marriage, and that the woman was a competent witness. *Robertson v. State*, 42 Ala. 509.

In a Maryland decision, discussing the question elaborately, and citing numerous authorities, it was held that to constitute a lawful marriage in that State, some religious ceremony must be superadded to the civil contract. The relation cannot be created by mere words of contract, whether present or future. *Denison v. Denison*, 35 Md. 361.

In the presence of about fifty persons, and in connection with religious services, parties desiring in good faith to contract matrimony respectively pronounced words like the following: "In the presence of God and these witnesses, I take the woman (man) whom I hold by the right hand to be my lawfully wedded wife (husband), to love and to cherish until the coming of our Lord Jesus Christ, or till death us do part." They had previously entered the notices required by law with the town clerk, and afterward returned the certificate to him with their signatures appended thereto. *Held*, in a prosecution for illicit cohabitation, that this was not a marriage. *Commonwealth v. Munson*, 127 Mass. 459.

For a curious example of a written agreement between two persons desiring to form a relation substantially the same as marriage, without acknowledging any obligation to the marriage law, see *State v. Miller*, 23 Minn. 352, 11 Am. L. Rev. 782.

A somewhat different aspect of the question is presented in cases determining what facts or proof of reputation raise a presumption of a marriage. Inasmuch as marriage is of common right, and valid by common law prevailing throughout Christendom, and regulations restrictive of it or imposing conditions upon it are exceptional, if one claims that a case falls within exceptions imposed by local law, the burden of proof is upon him to show the fact; *prima facie*, a good marriage may be shown by proof of a present agreement followed by cohabitation; and it will not be presumed, in the absence of proof, that there are regulations anywhere restrictive of this common right. *Hutchins v. Kimmell*, 31 Mich. 127. When a man and woman live together ostensibly as husband and wife, demean themselves towards each other as such, are received into society and treated by their friends and relatives as having, and as being entitled to, that status, the law will presume that they have been legally married (*Redgrave v. Redgrave*, 38 Md. 93); and the same presumption holds where the parties appeared at church, and the officiating minister publicly performed a ceremony of marriage between them, and they appeared to regard themselves as then married, although there were no proof of the particulars of the ceremony, or of the specific requisites of a lawful marriage ceremony, according to the forms and usages of such church (*People v. Calder*, 30 Mich. 85). It holds also where persons have represented themselves to be married, or have assumed the relation of husband and wife, cohabiting and holding themselves out to the public as such, though not in fact married; and in this case they will not be permitted to disprove or deny the marriage as between

the 26 Geo. II. c. 33, and the 4 Geo. IV. c. 17, made essential to the validity of all marriages of minors by license (not being

themselves when either is seeking to disturb or defeat rights which may have been acquired by the other on the faith of the marriage. *Johnson v. Johnson*, 1 Coldw. 626. Where a man and woman claimed to have been married at a particular time and place, and cohabited and kept house together as man and wife for ten years, it was held that a marriage in fact existed, even though the ceremonial marriage as claimed might have been disproved. *Tummalty v. Tummalty*, 3 Bradf. 369; s. p. *Grotgen v. Grotgen*, ib. 373. Where a woman has publicly enjoyed the status of a lawful wife for many years before her husband's death, and has been afterward recognized by the probate court as his widow, confirmed as tutrix of her children, and put in possession of his succession without any one doubting her right, but slight proof of the celebration of the marriage will suffice. *Hubbell v. Inkstein*, 7 La. Ann. 252. A marriage which was celebrated in Louisiana under the dominion of Spain may be established by reputation. *Cole v. Langley*, 14 La. Ann. 770; *Alloway v. Rabineau*, 8 La. Ann. 469. So, in general, circumstances of cohabitation, acknowledgment, reputation, and recognition by the family form a presumption that a connection was matrimonial, not meretricious. *Christie's Estate*, 1 Tuck. 81. And since the adoption of the fourteenth amendment to the Constitution of the United States, the same circumstances which will raise a presumption of a marriage between persons of the same race, will raise it as respects a white person and a negro. *Bonds v. Foster*, 36 Tex. 68. Where an agreement to marry stands as the consideration for a promissory note made by the intended husband and transferred to the intended wife, the presumption is that the parties were capable of making the contract of marriage. *Banfield v. Rumsey*, 4 Thomp. & C. 322.

After marriage has been contracted in due form, the law will require clear proof to remove the presumption that the contract is legal and valid (*Wilkie v. Collins*, 48 Miss. 497). Thus where marriage is presumable from the acts and confessions of the parties, it can be disproved only by the positive evidence of those who have had the opportunity of knowing their conduct and hearing their declarations, — the negative testimony of persons who never witnessed their intercourse is not sufficient (*Guardians of the Poor v. Nathan*, 2 Brews. 149; *Physick's Estate*, ib. 179); or by evidence that the connection had an illicit origin, (ib.); or by parol proof of a subsequent permanent separation between the parties without any apparent cause, and the marriage of one of them soon afterward (*Weatherford v. Weatherford*, 20 Ala. 548); or by proof of an earlier ceremonial marriage (*Decker v. Morton*, 1 Redf. 477). And when reputation is relied upon to raise the presumption of marriage, it must be founded on general, not divided or singular, opinion, or it amounts to no evidence at all. *Barnum v. Barnum*, 42 Md. 251. Evidence of consent and agreement to become man and wife, and of the two cohabiting together, is sufficient proof of marriage to legitimize the issue. *Cheseldine v. Brewer*, 1 Har. & M. 152; *Boone v. Purnell*, 28 Md. 607; *Ferrie v. Public Administrator*, 4 Bradf. 28; *Jackson v. Rhem*, 6 Jones Eq. 141. After cohabitation as man and wife for a long period, e. g. twenty years, the validity of the marriage will not be gone into collaterally on a question of the settlement of the parties as paupers. *Newbury v. Brunswick*, 2 Vt. 161. But where a pauper was charged with living with another's wife, it was held that a legal marriage to such other must be proved; evidence of reputation and cohabitation being rejected. *Poultney v. Fairhaven*, Brayt. 185.

Generally, when a marriage is proved to have taken place, the relation of coverture is presumed to continue, in the absence of something to show the contrary (*Erskine v. Davis*, 25 Ill. 551); but this presumption will not prevail to defeat the

widowers or widows, who were deemed to be emancipated), so that after a marriage had been actually celebrated and consummated, and followed by the procreation of children and a lengthened cohabitation, it might be annulled by the ecclesiastical court, and declared void *ab initio*, by reason of the want of such consent prior to the celebration of the nuptials. (*f*) But this was found to be productive of so much mischief, that these acts were repealed; and it has now been enacted that, after the marriage has been actually solemnized, it shall not be necessary in support of such marriage to give any proof of the residence of the parties previous to the marriage within the district where the marriage was solemnized, or of the consent of any person whose consent to the marriage is required by law, and that no evidence shall be given to prove the non-residence or non-consent in any suit touching the validity of such marriage. (*g*)

Of the Age of Consent.—The age of consent to marriage is fourteen in males, and twelve in females. If, however, a boy under fourteen, or a girl under twelve, actually goes through the form of marriage, such marriage is not absolutely void; it is inchoate and imperfect only. If on arriving at the age of consent they *cohabit, or continue a cohabitation [* 849] previously begun, the marriage is a good marriage, by reason of the subsequent ratification of the contract. “The time of agreement or disagreement when they marry *infra annos nuptiles* is, for the woman, at twelve or after, and for the man, at four-

will of a woman who is shown to have been once married, but undertakes to dispose of property which clearly belonged to her husband, if alive, where the contestants did not raise the objection in the court below, or offer evidence that she was then a *feme covert* (*Fatheree v. Lawrence*, 33 Miss. 585). So illicit connection, once proved to exist, is presumed to continue until distinct proof of marriage is offered (*Barnum v. Barnum*, 42 Md. 251); although it has been held that this is but a slight presumption, which may be overcome by circumstances going to show a subsequent marriage, even if no distinct valid act of marriage can be proved (*Caujolle v. Ferrie*, 23 N. Y. 90). Cohabitation known to be adulterous in its origin, a former wife being still alive, conveys no right to the guilty parties against third persons; nor does the continuance of such cohabitation after the death of the lawful wife afford legal presumption of a subsequent marriage. *Cram v. Burnham*, 5 Me. 213; but see *Hyde v. Hyde*, 3 Bradf. 509.

(*f*) *Harrison v. Southampton*, 22 L. R. v. Birmingham, 8 B. & C. 29; 7 & 8 J. Ch. 722. Vict. c. 56, sect. 3; 19 & 20 Vict. c. 119,

(*g*) 4 Geo. IV. c. 76, sects. 16, 26; sect. 17.

teen or after ; and there need be no new marriage if they so agree. But disagree they cannot before the said ages ; and then they may disagree and marry again to others without any divorce ; and if they once after give consent, they can never disagree after." (*h*)

Presumption of Marriage. — Where the form of marriage has been gone through, it will be presumed that all the requisites of a valid marriage have occurred, until the contrary be shown ; and where there has been cohabitation as man and wife, the law presumes marriage until the contrary be proved. (*i*)

Void Marriages. — All marriages celebrated after the 31st of August, 1835, between persons within the prohibited degrees of affinity are absolutely void. (*k*) If a widower, therefore, goes through the marriage ceremony with the sister of his deceased wife, or a widow with the brother of her deceased husband, the ceremony is a mere form, and will be productive of no legal marriage between the parties. (*l*) It has been enacted that, if any persons knowingly and wilfully intermarry in any other place than a church, or chapel, or registered building, or the registrar's office, without license, or due publication of banns, or due notice to the superintendent-registrar, or without certificate of notice duly issued, or in the absence of a registrar or superintendent-registrar where the presence of a registrar or superintendent-registrar is necessary, the marriage of such persons shall be absolutely null and void. (*m*) But it must be shown that *both* parties have knowingly and wilfully disregarded the provisions of the Marriage Acts. If the disobedience and misconduct are on one side only, the marriage is not invalid. (*n*) And by the 19 & 20 Vict. c. 119, sect. 17, it is enacted that, after any marriage shall have been solemnized under the authority of the 6 & 7 Wm. IV. c. 85, the 1 Vict. c. 22, and the 3 & 4 Vict. c. 72, it shall not be necessary in support of such marriage to give any proof that the registered building in which any mar-

(*h*) Co. Litt. 79 a, 79 b ; 1 Rolle, Abr. 341.

(*i*) Sichel v. Lambert, 33 L. J. C. P. 137 ; 15 C. B. N. s. 781.

(*k*) 5 & 6 Wm. IV. c. 54.

(*l*) Reg. v. Chadwick, 11 Q. B. 173, 205 ; 15 C. B. N. s. 781.

(*m*) 4 Geo. IV. c. 76, sect. 22 ; 6 & 7 Wm. IV. c. 85, sect. 42 ; Reg. v. Millis, 10 Cl. & Fin. 534 ; 7 Jur. 911 ; Catherwood v. Caslon, 13 M. & W. 261.

(*n*) Wright v. Elwood, 1 Curt. 49, 662 ; Dormer v. Williams, ib. 874.

riage may have been solemnized had been certified as a place of religious worship, or that it was the usual place of worship of either of the parties, nor shall any *evidence be [* 850] given to prove the contrary in any suit touching the validity of the marriage.

Publication of Banns and Celebration of Marriage in a False Name. — If banns have been published in a false name with the knowledge of both the parties to the marriage contract for purposes of fraudulent concealment, the marriage will be invalid ; (o) but no court of justice, ecclesiastical or civil, will lend its aid to enable a man who has concealed his true name at the time of the publication of the banns, or has purposely procured the banns to be published in false names, without the knowledge of the woman he was about to marry, to turn round upon her and annul the marriage and bastardize his children on the ground that HE had knowingly and wilfully evaded the provisions of the Marriage Acts. Thus where James Carpenter, being about to marry Susan Spencer, procured the banns to be published in the names of James Carpenter and Agnes *Watts*, and she was married in the name of Agnes Watts, but she did not know, until after the marriage had been solemnized and consummated, that the banns had been published in a wrong name, and that she had been married in a wrong name, it was held that she was lawfully married, notwithstanding the misnomer. (p) If one of the parties to the marriage contract has assumed a false name and description, and procured the publication of the banns and the celebration of the marriage in such false name, for the purpose of concealing his or her real estate and condition in life, the other party who has been deceived, and who has thus been induced to go through the marriage ceremony with a person who is substantially a different person from what was thought and expected at the time, is entitled to a declaration of the nullity of the marriage from the ecclesiastical court. (q) If the error is

(o) *Midgley v. Wood*, 30 L. J. P. & M. 57. It must be shown that both parties knowingly and wilfully concurred. *Gompertz v. Kensit*, L. R. 13 Eq. 369 ; 41 L. J. Ch. 382.

640 ; 1 N. & M. 712 ; *Rex v. Billingshurst*, 3 M. & S. 257 ; *Pougett v. Tomkyns*, ib. 264, n.

(q) *Frankland v. Nicholson*, 3 M. & S. 261, n. ; *Midgley v. Wood*, 30 L. J.

(p) *Rex v. Wroxtton*, 4 B. & Ad. P. & M. 57.

not a mere *error nominis*, or misnomer, but an error *de corpore* or *de persona*, the contract is voidable as to the party who has been deceived, from want of consent; but if it is a mere misnomer, and the party has married the person that he or she all along intended to marry, the mere verbal mistake will not suffice to invalidate the marriage. (r) Numerous cases have occurred where in the publication of banns there has been a partial departure from the true name, and the marriage has, [* 851] notwithstanding, in the absence of fraud, been held * to be valid, on the ground that the name, though incorrect, designated the right person. (s)

Marriage by License in a False Name is not of the same importance as marriage by banns in a false name. A mere misdescription or misnomer of the parties in the license will not avoid the marriage, provided the incorrect name represents the right person. (t) But if any fraud or intentional deception has been practised with the knowledge and connivance of *both* parties upon the ordinary, — “if, for instance, a license were obtained for one person with the intention that it should be used for another, — such a license would not be valid.” (u)

Fraudulent Celebration of a Sham Marriage. — A party cannot avail himself of his own fraud to annul an apparent marriage. If a man has imposed a pretended clergyman and a supposititious license upon a young unmarried woman, the court will not at *his* instance annul the apparent marriage. (x) If persons professing to marry according to the rites of the Church of England knowingly or wilfully consent to, or acquiesce in, the solemnization of such marriage by any person not being in holy orders, the marriage is null and void. (y)

The law of the country where a marriage is solemnized does not always determine the validity of the marriage. If foreigners domiciled abroad come to England and get married in conformity with English law, the marriage will be a valid marriage here,

(r) *Clowes v. Clowes*, 3 Curt. 190;
Rex v. Burton-on-Trent, 3 M. & S. 538.

(s) *Sullivan v. Sullivan*, cited *Bevan* 288.

v. *M'Mahon*, 30 L. J. P. & M. 71.

(t) *Bevan v. M'Mahon*, *ut sup.*

(u) *Lane v. Goodwin*, 4 Q. B. 366.

(x) *Hawke v. Corri*, 2 Hag. Consist.

(y) 4 Geo. IV. c. 76, sect. 22.

though it be null and void by the law of France. (z) A marriage celebrated in France, on the other hand, may be valid in this country, though it is invalid according to French law. (a)

Whenever any attempt is to be made to invalidate a marriage, parties must not slumber over their rights; for "everything," observes Sir William Scott, "is to be presumed in favor of a matrimonial union which has produced children, and united parties by a long cohabitation; such a union is not to be dissolved, unless by some pressing obligation of law." (b)

Of the Husband's Right to the Rents and Profits of the Wife's Lands. (bb) — The husband is so far master of the estates of freehold and inheritance belonging to the wife at the time of her marriage, and not settled to her separate use, as to be entitled to receive the profits of them during his life, and to sue upon all covenants running with the land, entered into with the wife or her ancestors; * but he cannot dispose [* 852] of the estates, or convey them away, except for the joint lives of himself and his wife, (c) without the concurrence of the wife, who must execute the deed of conveyance and make the prescribed acknowledgment thereof before properly appointed officers, a certificate of that acknowledgment being filed of record. (d) But the marriage operates as a gift in law to the husband of all the wife's chattels real or leasehold estates; also of all estates by statute merchant, statute staple, and *elegit*. The husband may, consequently, sell them or mortgage them without the sanction or concurrence of the wife. He may also forfeit them; and they may be extended and sold for his debts. (e)

The husband is entitled to the profits during his life of any estates of freehold and inheritance, and to any personalty absolutely, which may come to the wife during the coverture, and

(z) *Simonin v. Mallac*, 29 L. J. P. & M. 97. band and wife are now set forth in the Married Women's Property Act, 1882.

(a) *Este v. Smith*, 18 Beav. 121

(c) *Robertson v. Morris*, 11 Q. B.

(b) *Diddear v. Fancit*, 3 Phil. 581; *Piers v. Piers*, 2 H. L. C. 367; *Field's Mar., &c.*, ib. 48.

916.

(d) *Jolly v. Handcock*, 7 Exch. 820.

(bb) The rights and liabilities of hus-

(e) *Bac. Abr. Baron and Feme* (C 2); *Co. Litt.* 466; *Plowd.* 192; *Doe v. Plowden*, 1 H. Bl. 535.

which are not settled to her separate use, unless the marriage took place after the 9th of August, 1870, and the property came to the wife from an intestate, or is a sum of money not exceeding £200, coming to her under a deed or will, in which case the said property or sum of money will, subject and without prejudice to the trusts of any settlement affecting the same, belong to the wife for her separate use, and her receipts alone will be a good discharge. (*f*)

In all actions for a profit or demand accruing during coverture in respect of the real estate of the wife, the husband and wife may join, or the husband may sue alone, as in an action for not setting out tithes belonging to the wife, (*g*) and so for rents and services accruing to the husband during the coverture, either in respect of the real estate of the wife, or as annexed to a reversion granted to the husband and wife jointly. But if the husband alone demises his wife's lands for a term of years for a certain rent, the wife cannot be joined with him as co-plaintiff in an action for the recovery of the rent. The husband alone is entitled to distrain for the rent; and the tenant is bound to deliver up the land to him at the expiration of the term. (*h*)

Formerly the husband was entitled to the fruits of the wife's labor; but by the Married Women's Property Act, 1870, (*i*) sect. 1, the wages and earnings of any married woman acquired or gained by her after the passing of that act, in any employment, * occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, are to be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone will be a good discharge for such wages, earnings, money, and property. (*k*)

Formerly the husband acquired by the marriage the power of

(*f*) 33 & 34 Vict. c. 93, sects. 7, 8; 142; *North v. Wyard*, 2 Bulst. 233; *In re Voss*, 13 Ch. D. 504. *Harcourt v. Wyman*, 3 Exch. 824;

(*g*) *Beadle v. Sherman*, Cro. Eliz. *Parry v. Handle*, 2 Taunt. 180. 608, 613.

(*i*) 33 & 34 Vict. c. 93.

(*h*) *Wallis v. Harrison*, 5 M. & W. (*k*) And see sects. 2, 3, 4, 5, & 11.

reducing any of his wife's *choses in action* into possession. (l) But by the Married Women's Property Act, 1870, (m) sect. 2, notwithstanding any provision to the contrary in the 10 Geo. IV. c. 24, enabling the commissioners for the reduction of the national debt to grant life annuities for terms of years, or in the acts relating to savings-banks and post-office savings-banks, any deposit thereafter made, and any annuity granted by the said commissioners under any of the said acts in the name of a married woman, or in the name of a woman who may marry after such deposit or grant, is to be deemed to be the separate property of such woman, and the same is to be accounted for and paid to her as if she were an unmarried woman; provided that if any such deposit is made by, or such annuity granted to, a married woman by means of moneys of her husband without his consent, the court may, upon an application under sect. 9 of that act, order such deposit or annuity, or any part thereof, to be paid to the husband. By sect. 3, any married woman, or any woman about to be married, may apply to the governor and company of the Bank of England, or to the governor and company of the Bank of Ireland, by a form to be provided by the governor of each of the said banks and company for that purpose, that any sum forming part of the public stocks and funds, and not being less than £20, to which the woman so applying is entitled, or which she is about to acquire, may be transferred to, or made to stand in, the books of the governor and company to whom such application is made, in the name or intended name of the woman, as a married woman entitled to her separate use; and on such sum being entered in the books of the said governor and company accordingly, the same is to be deemed the separate property of such woman, and is to be transferred, and the dividends paid, as if she were an unmarried woman; provided that if any such investment in the funds is made by a married woman by means of moneys of her husband without his consent, the court may, upon * an application under sect. 9, order such investment and the dividends thereof, or any part thereof, to be transferred and paid to the husband. By sect. 4, any

(l) *Post*, p. * 1305.

(m) 33 & 34 Vict. c. 93.

married woman, or any woman about to be married, may apply in writing to the directors or managers of any incorporated or joint-stock company, that any fully paid-up shares, or any debenture or debenture stock, or any stock of such company, to the holding of which no liability is attached, and to which the woman so applying is entitled, may be registered in the books of the said company in the name or intended name of the woman as a married woman entitled to her separate use, and it will be the duty of such directors or managers to register such shares or stock accordingly, and the same upon being so registered is to be deemed to be the separate property of such woman, and is to be transferred, and the dividends and profits paid, as if she were an unmarried woman; provided that if any such investment as last mentioned is made by a married woman by means of moneys of her husband without his consent, the court may, upon an application under sect. 9, order such investment and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband. By sect. 5, any married woman, or any woman about to be married, may apply in writing to the committee of management of any industrial and provident society, or to the trustees of any friendly society, benefit building society, or loan society duly registered, certified, or enrolled under the acts relating to such societies respectively, that any share, benefit, debenture, right, or claim whatsoever in, to, or upon the funds of such society, to the holding of which share, benefit, or debenture no liability is attached, and to which the woman so applying is entitled, may be entered in the books of the society, in the name or intended name of the woman as a married woman entitled to her separate use, and it will be the duty of such committee or trustees to cause the same to be so entered, and thereupon such share, benefit, debenture, right or claim is to be deemed to be the separate property of such woman, and is to be transferable and payable, with all dividends and profits thereon, as if she were an unmarried woman; provided that if any such share, benefit, debenture, right, or claim has been obtained by a married woman by means of moneys of her husband without his consent, the court may, upon an application under sect. 9, order the same, and the dividends and profits thereon, or any part thereof, to be transferred

and paid to the husband. By sect. 6, nothing thereinbefore contained in reference to moneys deposited in, or annuities granted by, savings-banks, or moneys invested in the funds, or in shares or stocks of any company, shall, as against creditors of the husband, give validity to any deposit or * investment [* 855] of moneys of the husband made in fraud of such creditors, and any moneys so deposited or invested may be followed as if that act had not passed. By sect. 10, a married woman may effect a policy of insurance upon her own life, or the life of her husband, for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, will inure accordingly, and the contract in such policy will be as valid as if made with an unmarried woman. By the same section, a policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, is to inure and be deemed a trust for the benefit of his wife, for her separate use, and of his children, or any of them, according to the interest so expressed, and will not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland, according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the county court of the district, or in Ireland by the chairman of the Civil Bill Court of the division of the county in which the insurance office is situated, and the receipt of such trustee will be a good discharge to the office. If it is proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they will be entitled to receive out of the sum secured, an amount equal to the premiums so paid.

Gifts from the Husband to the Wife.—A gift may be made by a husband to his wife, which will be supported in equity; and the husband will be held to be a trustee for his wife of property which he has given to her, or pur-

chased for her with her own moneys; (*n*) but the gift must be complete. (*o*)

Liability of the Husband of a Feme Covert Executrix — A husband is liable for all the assets received, and for any *devastavit* committed, either by himself or his wife, during the coverture, in respect of an estate of which his wife was legal personal representative. (*p*)

Release by Marriage. — If a creditor marries his debtor, the debt is released and extinguished by the confusion of persons; but a contract not broken and not converted into a *chose in action* at the time of the marriage, or during the cover- [* 856] ture, will not be * released by the marriage. Consequently if a man, in contemplation of marriage, enters into a contract in writing with his intended wife, to the effect that his heirs or executors shall, after his decease, pay her a certain sum of money in case she should survive him, this contract is not released and discharged by the marriage. Therefore a bond, the condition of which cannot be broken during coverture, is not extinguished by the marriage of the obligor and obligee. (*q*) And such contract will be enforced when it would be in furtherance of the manifest intention and object of the parties to do so, as in the case of an agreement by persons about to marry for the mutual settlement of their estate, or of the estate of either of them on the other, on the marriage. "If a woman executrix marries the debtor, it is no release in law, because she has the debt in another right; and if it should amount to a release in law, it would amount to a *devastavit*, which is a wrong which the law will not suffer." (*r*) Therefore if the executrix of the obligee of a bond marry the obligor, there is no release of the debt; and after the death of such executrix an action may be maintained in respect of it by the administrator *de bonis non*. (*s*)

(*n*) *Mews v. Mews*, 15 Beav. 529; (*q*) *Milbourn v. Ewart*, 5 T. R. 385; *Parker v. Lechmere*, 12 Ch. D. 256; *Cage v. Acton*, 1 Ld. Raym. 515; 1 *Murray v. Glasse*, 17 Jur. 816; *Darkin v. Darkin*, 22 Law T. R. 278, Ch. Q. B. 328.

(*o*) *Price v. Price*, 21 L. J. Ch. 53.

(*r*) *Nedham's case*, 8 Co. 136 a.

(*p*) *Post*, p. * 1299; *Smith v. Smith*, 21 Beav. 387.

(*s*) *Wankford v. Wankford*, 1 Salk. 306.

Where a man covenanted to pay a woman an annuity for her separate use free from anticipation, and afterward married her, it was held that the annuity was only suspended by the marriage, and that the widow was entitled to recover arrears accrued subsequent to the death of the husband. (*t*) An obligation in which the husband is obligor and the wife is obligee is destroyed by the marriage; but this does not affect the rights of third parties. Where the wife is entitled to the bond as legal personal representative, and the extinguishment of the bond would prejudice creditors or legatees, such extinguishment will not take place; but where a wife besides being personal representative, was also sole legatee, and all debts had been paid, it was held that a bond given by her husband to his mother-in-law, the testatrix, was extinguished. (*u*)

Deeds of Separation. — The husband and wife cannot by contract between themselves change their legal capacities or characters. (*x*) When, therefore, by reason of matrimonial differences they wish to live separate upon certain terms, it is necessary that a trustee should be appointed to contract with the husband for that purpose. (*y*) The husband may covenant with any third * party to pay to him a certain sum of money [* 857] for the separate use of the wife, either for a term of years or during her natural life, provided the covenant is absolute and unqualified, and the performance of it is not made to depend upon the contingency of a future separation, or made conditional upon the wife's consent to live separate. (*z*) If it appears by the deed that the separation is not a present, immediate, and actually accomplished separation, but is subsequently to be carried into effect, the contract will be void, as being contrary to the public policy of the law. (*a*) A covenant by the trustee to indemnify the husband against debts and expenses

(*t*) *Fitzgerald v. Fitzgerald*, L. R. 2 P. C. 83; 37 L. J. P. C. 44.

(*u*) *In re Price*, 11 Ch. D. 160.

(*x*) Co. Litt. 112 a; *Ewers v. Hutton*, 3 Esp. 254; *Garth v. Earnshaw*, 3 Y. & C. 584; *Ld. St. John v. Ly. St. John*, 11 Ves. 530.

(*y*) *Sanders v. Rodway*, 16 Jur. 1005; *Hunt v. Hunt*, 31 Beav. 89.

(*z*) *Clough v. Lambert*, 10 Sim. 178;

Bostock v. Hume, 7 M. & Gr. 893; *Logan v. Birkett*, 1 Myl. & K. 225.

(*a*) *Westmeath v. Salisbury*, 5 Bl. n. s. 393; *Hindley v. Westmeath*, 6 B. & C. 200.

contracted by him and his wife during the time they were cohabiting together, as well as against debts that may subsequently be contracted by her, is not in contemplation of law a covenant or engagement to pay money as an inducement for a separation, and is not, consequently, void. (b) If the husband has been induced to execute the separation deed by fraudulent misrepresentation or fraudulent concealment on the part of the trustee, the deed will be invalid, and the husband cannot be sued upon it. (c) All contracts for the prevention of cohabitation between husband and wife are null and void, (d) unless it appears that the husband has by cruelty or misconduct forfeited his marital rights. (e) An agreement between a husband and the father of the wife, that the husband and wife should live apart, and that the husband should execute a deed of separation containing all usual and proper clauses, and securing an annuity for the maintenance of his wife and child, and that the expense of the agreement and deed should be borne equally by the husband and the father, has been decreed to be specifically performed. (f)

Subsequent reconciliation puts an end to the husband's covenant to pay an annuity to the wife, (g) unless it is provided that a subsequent cohabitation shall in no wise alter or affect such liability. (h) If the husband has not forfeited his marital rights by his own misconduct, he may discharge himself from [* 858] his liability thereon by offering to receive back the wife, (i) unless he has covenanted absolutely and unconditionally with the trustee to pay the annuity during the life of the wife, (k) in which case his liability to pay the annuity is not

(b) *Jones v. Waite*, 7 Sc. 328; 5 Sc. Hagg. Eccles. Sup. 115; *Swift v. Swift*, N. R. 951; *Summers v. Ball*, 8 M. & W. 34 L. J. Ch. 209.

(c) *Evans v. Edmonds*, 22 L. J. C. P. 211; 13 C. B. 777; *Evans v. Carrington*, 30 L. J. Ch. 364; but see *Kendal v. Webster*, 1 H. & C. 440; 31 L. J. Ex. 492.

(d) *Wren v. Bradley*, 17 L. J. Ch. 172; *Cartwright v. Cartwright*, 22 ib. 841.

(e) *Westmeath v. Westmeath*, 2 C. 250.

(f) *Gibbs v. Harding*, L. R. 5 Ch. 336; 39 L. J. Ch. 374; and see the 36 Vict. c. 12, sect. 2.

(g) *Ld. St. John v. Ly. St. John*, 11 Ves. 537; *Bateman v. Ross*, 1 Dow, 245.

(h) *Wilson v. Mushett*, 3 B. & Ad. 751; *Webster v. Webster*, 22 L. J. Ch. 837.

(i) *Whorewood v. Whorewood*, Ch. C. 250.

(k) *Seeling v. Crawley*, 2 Vern. 386.

discharged by the subsequent commission of adultery by the wife, or by a decree for a judicial separation pronounced in consequence of such adultery. (*l*) When a separation has taken place, and property has been settled upon the wife and children of the marriage for their support, the settlement will be upheld against the future creditors of the husband, unless it appears that the separation was illusory, and without adequate cause. (*m*)

Wife's Right of Action after Separation.—By the Married Women's Property Act, 1870, (*n*) sect. 11, a married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by that act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property; and she will have in her own name the same remedies, both civil and criminal, against all persons whomsoever, for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman. When the husband and wife are living separate, the wife may bring an action against the husband, in the name of the trustee of the deed of separation, if the latter refuses to carry out the trusts of the deeds, on tendering an indemnity against costs. (*o*) Where the husband in a deed of separation agreed to allow the wife to enjoy certain separate estate and property, and covenanted that he would ratify all proceedings in his name for obtaining the property, and the wife brought an action on a note in the name of her husband and herself, and the husband released the debt, the court ordered the release to be given up to be cancelled. (*p*)

Effect of a Decree for a Divorce.—After a decree of divorce,

(*l*) *Baynon v. Batley*, 1 M. & Sc. 339; 8 Bing. 256; *Jee v. Thurlow*, 2 B. & C. 551; 4 D. & R. 11; *Seagrave v. Seagrave*, 13 Ves. 439.

(*m*) *Hobbs v. Hull*, 1 Cox, 445; *Nunn v. Wilmore*, 8 T. R. 529; *Stephens v. Olive*, 2 Br. C. C. 90.

(*n*) 33 & 34 Vict. c. 93.

(*o*) *Morgan v. Thomas*, 2 C. & M. 388; *Auster v. Holland*, 15 L. J. Q. B. 229.

(*p*) *Innell v. Newman*, 4 B. & Ald. 419; *Chambers v. Donaldson*, 9 East, 471.

the *choses in action* of a wife which have not been reduced into possession by the husband belong to her absolutely. (q)
 [* 859] The * status of a married woman is not, however, affected by a decree nisi. (r)

Effect of a Decree for a Judicial Separation. — After a decree for a judicial separation, the wife's *choses in action* not reduced into the husband's possession before the decree, become her absolute property. (s) Where a married woman entitled to a reversionary interest in personalty has joined with her husband in mortgaging such interest, and has afterward obtained a decree for judicial separation, and is living apart from her husband, on the property coming into possession she is entitled to it absolutely, under the 20 & 21 Vict. c. 85, sect. 25. (t) And by sect. 26 the wife is to be considered as a *feme sole* for the purposes of contract and suing and being sued, and her husband is not to be liable in respect of any engagement or contract she may have entered into, &c., except where alimony has been ordered and has not been paid by the husband, when the husband will be liable for necessities.

Dissolution of the Coverture by Death — The Husband's Rights by Survivorship. — If the coverture be dissolved by the death of the wife, and the husband becomes tenant by the courtesy of the wife's estates of inheritance, he is clothed with the interests in all real contracts or covenants annexed to such estates. But upon real contracts annexed to the wife's estates of freehold and inheritance of which he is not tenant by the courtesy, but which descend after her death upon her heir at law, the husband can maintain no action, although such contracts have been entered into during the coverture with both husband and wife jointly. (u) If during coverture a lease be made by husband and wife according to the provisions of the 32 Hen. VIII. c. 28, sect. 3, containing a covenant from the lessee to pay rent to the husband and wife and the heirs of the wife, and the surviving husband brings an

(q) *Wells v. Malbon*, 31 L. J. Ch. 344. (t) *Insole, In re*, L. R. 1 Eq. 470; 35 L. J. Ch. 177; and see *Prole v. Soady*, L. R. 3 Ch. 220; 37 L. J. Ch. 246; C. A. *Nicholson v. Drury Buildings Co.*, 7 Ch. D. 48.
 (r) *Norman v. Villars*, 2 Ex. D. 259. (u) *Blake v. Foster*, 8 T. R. 487.
 (s) *Johnson v. Lander*, L. R. 7 Eq. 228; 38 L. J. Ch. 229.

action on the covenant for non-payment of the rent, the action may be defeated by a plea showing that the demised premises were the property of the wife, and that the plaintiff never had any estate in them but in right of his wife, and that she died without issue before the rent became due, leaving A her heir at law, who claimed the rent. (x) But all "fruits fallen" during the coverture, such as a relief due in right of the wife's manor or seignior, arrears of a rent-charge granted either to the wife alone, or to *the husband and wife jointly, [* 860] and all arrears of rent due at the death of the wife, are recoverable by the husband in his own right. For all breaches of covenants, also, not in the nature of continuing breaches, where the ultimate damage has accrued during the coverture, the husband may maintain an action in his own right after the death of his wife, although the lands have descended to her heir at law. If, too, the surviving husband was seised during coverture of a rent-charge in fee, fee-tail, or for life, in right of his wife, he may by statute sue in his own right for arrears which accrued before the marriage, as well as for such as accrued during the coverture. (y)

Recovery by the Surviving Husband of Money and Property belonging to his Deceased Wife. — If a debt by bond be due to a *feme sole* who afterward marries, and the husband makes a letter of attorney to a third party to receive the money, who receives it accordingly, and the wife dies, the husband shall have an action in his own right for this money; for by the receipt the property therein becomes vested in the husband. So if a legacy devised to a married woman be actually received by an attorney or agent duly appointed for that purpose by the husband alone, or by the husband and wife jointly, it is thenceforth no longer a *chose in action* of the wife, but money had and received to the use of the husband, who may sue for it, after the death of his wife, in his own right. (z) The surviving husband was also formerly entitled to the wife's savings from her own separate income, given or lent by her in her lifetime to her rela-

(x) *Hill v. Saunders*, 7 D. & R. 17.(z) *Huntley v. Griffith*, Moore, 452;(y) 32 Hen. VIII. c. 37, sect. 3; *Andrew Ognell's case*, 4 Co. 51 a, b.Golds. 159, 160; *In re Barber*, 11 Ch. D. 442.

tions or friends, and might maintain an action for the recovery of all such money, although by the terms of the settlement she was to enjoy it free from all control or interference on the part of the husband. (a) If the husband has commenced a joint action, in his own name and in that of his wife, for the purpose of reducing the wife's *choses in action* into possession, and the wife dies before judgment, the action is at an end, and the unrecovered *choses in action* vests in the wife's personal representative; but if the wife dies after judgment, but before execution, the husband alone is entitled to the benefit of the judgment, and may have execution without a *scire facias*. (b) The receipt by the husband of interest on a promissory note made to [* 861] the wife before the * marriage is no evidence of a reduction of the note into the possession of the husband during the coverture. (c)

Rights of the Surviving Husband as Administrator to the Wife. — The surviving husband is entitled *jure mariti* to demand administration of his wife's personal estate, and may recover the same for his own use and benefit. (d) If the surviving husband should die before he has obtained a grant of administration, or before all the wife's *choses in action* have been reduced into possession, administration *de bonis non* of the wife must be taken out; (e) and this is granted to the next of kin of the husband, as the party by law entitled to the property; (f) and if administration *de bonis non* of the wife is obtained by any third person, he is a trustee for the representative of the husband. (g) Chattels real and personalty possessed by the wife *in autre droit*, as executrix or administratrix, do not, as previously mentioned, vest in the husband by survivorship, but belong to the administrator *de bonis non* of the testator or intestate. (h)

(a) *Molony v. Kennedy*, 10 Sim. 254; *Johnstone v. Lumb*, 15 ib. 308; but see now the Married Women's Property Act, 1870. (e) *Betts v. Kimpton*, 2 B. & Ad. 273; *Fleet v. Perrins*, L. R. 4 Q. B. 500; 38 L. J. Q. B. 257.

(b) *Checchi v. Powell*, 6 B. & C. 253; 9 D. & R. 243; *Gabriel Miles's case*, 1 Mod. 179. (f) *Fielder v. Hanger*, 3 Hag. 769; *In re Pountney*, 4 ib. 289.

(c) *Hart v. Stephens*, 6 Q. B. 937. (g) *Squib v. Wyn*, 1 P. W. 378. (d) 29 Car. II. c. 3, sect. 25; *Humphrey v. Bullen*, 1 Atk. 459. (h) *Williams's Executors*, 319, ed. 1841.

Liabilities of the Surviving Husband. — Where the husband takes the benefit of contracts annexed to the wife's freehold and leasehold estates, he is charged with the burthen of performance of them. He is liable also for the expenses of his wife's funeral to any stranger who may undertake the duty of burying her, in default of the performance of that duty by the husband himself. (i)

Of the Wife's Rights by Survivorship. — The surviving wife is absolutely entitled to all her estates of freehold and inheritance, and to all chattels real and terms of years in land held by the husband during the coverture in her right, and remaining undisposed of at the time of his death. (k) If during the coverture the husband alone has granted an underlease out of the wife's term of years, reserving rent to himself, this amounts to a disposition *pro tanto* of the term, the rent becomes the sole and absolute property of the husband, and his personal representative is entitled to it at his death, although the reversion for the residue of the term remains vested in the wife; but if the wife be made a party to the underlease, and the rent be reserved to herself and husband jointly, then she is entitled by survivorship to the rent and to all arrears remaining due at the husband's death. (l) So also if a lease be made by husband and wife of her * freehold estate, but not acknowledged by [* 862] the wife under the 3 & 4 Wm. IV. c. 74, sect. 79, and the husband die during the term, and the wife do no act to disaffirm the tenancy, and also die during the term, in the absence of any proof that it was contemplated when the deed was executed that the acknowledgment of the wife should be taken, the lease will be valid up to the time of her death, and an action may be maintained by her representatives on the covenants in the lease in respect of breaches that may have occurred during her life and after her husband's death. (m) The surviving wife is also entitled to all the fruits of her freehold estate "fallen during coverture," to all arrears of rent reserved on leases made

(i) *Post*, p. * 1030; *Ambrose v. Kerrison*, 20 L. J. C. P. 135.

(k) *Co. Litt.* 351 a; 351 b.

(l) *Blaxton v. Heath*, Pop. 145; *Dre v. Baily*, 3 Keb. 298, 300.

(m) *Toler v. Slater*, L. R. 3 Q. B. 42; 37 L. J. Q. B. 33.

by her for life or years before the marriage, and to all rents, service, charge, or seck, of which she was seised *dum sola*, or of which the husband was seised in her right, or of which she and her husband were seised jointly, during the coverture; and she may, after the death of her husband, maintain an action in her own right to recover them. But if the money has been actually received by a person appointed by the husband for that purpose during the coverture, it becomes the absolute property of the husband, being money had and received to his use; and his personal representative, therefore, and not the wife, is then the party entitled to an action for its recovery. (n) If the money is received on the express understanding that it is to be held for the husband and wife jointly, part of it being for the separate use of the wife, there is no reduction into possession on the part of the husband; and if he dies while the money is in the hands of the person so receiving it, it will belong to the wife. (o)

Unrecovered Choses in Action. — The wife is also entitled by survivorship to property purchased by her and her husband in their joint names; and if the purchase money has not all been paid in the lifetime of the husband, she is entitled after his decease to have the balance discharged out of his general assets. (q) She is also entitled to the benefit of all contracts under seal entered into during the coverture with herself [* 863] alone, * or with her husband and herself jointly; (r) but she may waive her right to the instrument, and it then becomes the obligation of the baron alone. And if after the death of her husband she sues upon the deed as his administratrix, and not in her own right, this appears to be a sufficient election and waiver of the instrument on her part; and on her death, therefore, before judgment, the administrator *de bonis non* of the husband, and not her own personal representative, must bring an action for the money. (s) To a debt due on a joint judgment recovered by herself and husband during the coverture,

(n) 1 Roll. Abr. D. 350; Co. Litt. 451 a; *Temple v. Temple*, Cro. Eliz. 791. (r) 1 Roll. Abr. 349 (B); *Coppin v.* —, 2 P. W. 496.

(o) *Jones v. Cuthbertson*, L. R. 7 Q. B. 215; 41 L. J. Q. B. 145. (s) *Norton v. Glover*, Noy's Rep. 149.

(q) *Drew v. Martin*, 2 H. & M. 130; 33 L. J. Ch. 367.

the wife is also entitled by survivorship. (*t*) The surviving wife is entitled also to all railway shares and stock standing in her name in the books of a railway company, (*u*) and to all promissory notes and bills of exchange made payable to her during the coverture, and to all express simple contracts, where the promise has been made to herself during the marriage, and the consideration to support it has moved from her. (*x*) Where a *feme covert* administratrix received a sum of money in that character, and lent the same to her husband, taking in return for it the joint and several promissory notes of her husband and two other persons, payable to her with interest, and the husband died, it was held that the note was a *chose in action* surviving to the wife. (*y*) As regards a simple contract, however, made with the wife alone, or with the husband and wife jointly, during coverture, the husband may elect to let his wife have the benefit of it by survivorship, or he may take it himself. If in his lifetime he brings an action upon the contract in his own name, that amounts to an election to appropriate it to himself, and the wife cannot, consequently, in this case take it by survivorship. (*z*) If he joins his wife as a party suing on the contract, and dies, she may, by entering a suggestion of the death upon the record, prosecute the suit to judgment for her own sole use; and even if judgment has been signed in the action so commenced prior to the husband's death, but no execution levied, the benefit of the judgment will survive to the wife, and she may forthwith issue execution thereon for her own use. (*a*)

Gifts to the Wife during Marriage of diamonds, furniture, plate, &c., inure to the separate use of the wife; and she is *entitled to them in her own right, the husband being considered, in respect of his legal interest, a trustee for the wife (*ante*, p. * 855).

Paraphernalia. — Gifts of personal ornaments by the husband

(*t*) Com. Dig. Bar. et Feme, F. 1; Oglender v. Baston, 1 Vern. 396. (*y*) Richards v. Richards, 2 B. & Ad. 447.

(*u*) Dalton v. Mid. Ry. Co., 22 L. J. C. P. 177; 12 C. B. 458. (*z*) Scarpellini v. Atcheson, 7 Q. B. 864.

(*x*) Nash v. Nash, 2 Mad. 133; (*a*) Sherrington v. Yates, 12 M. & W. 865; Bond v. Simmons, 3 Atk. 21; Gaters v. Madeley, 6 M. & W. 423. Nanney v. Martin, 1 Ch. C. 27.

to the wife are considered paraphernalia, and belong to the wife on the death of the husband, unless the assets of the husband are insufficient for the liquidation of his debts, in which case they may be seized and sold by his creditors. The husband cannot devise his wife's paraphernalia; but he may pledge them; and they are answerable for his debts, if his assets are insufficient for the payment of them. Old family jewels coming from the husband's family are not paraphernalia, though worn by the wife during marriage. (b)

Liabilities of the Surviving Wife. — If a husband, separated from his wife, has not been heard of for seven years, he is presumed to be dead, and the wife becomes, from that time, to all intents and purposes, a single woman, and is responsible for the fulfilment of all contracts she may afterward enter into.

When the Wife is entitled to an Indemnity out of the Estate of her Deceased Husband. — If the wife has executed a bond, or accepted a bill of exchange, or given her promissory note, or any other contract or security, to enable the husband to raise money thereon for his own purposes, or if she has lent her husband the savings from her separate property, she is entitled, on the death of her husband, to be recouped out of her husband's estate. (c) If during the marriage the husband has pledged any of the wife's paraphernalia, the wife is entitled to have them redeemed for her use out of his personal estate. (d)

(b) *Graham v. Londonderry*, 3 Atk. 393; *Jervoise v. Jervoise*, 17 Beav. 571; *Northey v. Northey*, 2 Atk. 78.

(c) *Hudson v. Carmichael*, 23 L. J. Ch. 893.
(d) *Graham v. Londonderry*, *supra*.

* CHAPTER VII.

[* 865]

THE CONTRACT OF SALE.

SECTION I.

OF CONTRACTS FOR THE SALE OF LANDS.

Preliminary Remark. — The laws relating to the sale of lands have been in many respects modified by recent legislation; and the reader must remember throughout this section that the law as here laid down must be taken to be subject to such modification. As far as possible, the recent legislation has been introduced into the text; but as so much of it only applies in certain cases and not in others, it has been necessary to retain the original text, and only to remind the reader of the recent statutes where it seems absolutely necessary to do so. The statutes referred to are the Vendor's and Purchaser's Act, 1874, (a) the Land Transfer Act, 1875, (b) and the Conveyancing and Law of Property Act, 1881. (c)

Contracts of Sale.¹ — The contract of purchase and sale is founded upon a mutuality of engagement or upon mutual pro-

¹ For the American law as to vendors and purchasers of real estate, consult Hilliard, *Vendors & Purchasers* (2d ed. 1868); Bingham, *Executory Contracts for Sale of Real Property* (1872); 1 *Pars. Contr.* 492; Story, *Sales* (4th ed. 1872); U. S. Dig. tit. *Vendor and Purchaser*; Rorer, *Judicial Sales* (2d ed. 1878); Freeman, *Void Judicial Sales* (1877); Martindale, *Conveyancing* (1882); articles on the Nature and effect of a quit-claim deed, by W. B. Martindale, 12 *Cent. L. J.* 127; on Rights of parties who acquire an interest in land subject to a lien, by O. F. Bump, 7 *South. L. Rev. n. s.* 357; on Judicial sale, &c., 11 *West. Jur.* 195; on Covenants in deeds, 12 *ib.* 385, *ib.* 454; on Deed executed and delivered with name of grantee blank, &c., 13 *ib.* 298; on Conveyance of easements by implication, 26 *Alb. L. J.* 224, &c.; on Rights of *bona fide* purchasers of under-due negotiable

(a) 37 & 38 Vict. c. 78.

(b) 38 & 39 Vict. c. 87.

(c) 44 & 45 Vict. c. 41.

mises, the promise or undertaking of the one party to sell being the consideration for the promise of the other to buy. It is completed and rendered binding, consequently, if properly authenticated, by the bare consent of the parties, and ranks amongst that class of contracts called bilateral contracts. It is essential to the creation of a contract of sale that there be a price consisting of a sum of money to be paid by the buyer to the seller; for if "there is an agreement that I shall sell you my horse for one of your books, this agreement does not constitute a SALE, but a different kind of contract, viz., an EXCHANGE." (*d*)

[* 866] *Sale of Lands and Corporeal Hereditaments.⁹⁹ — We have already seen that no action can be brought whereby to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the contract, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or by some other person by him lawfully authorized to sign it (*ante*, p. * 159); but that it is not necessary to show that the memorandum of the agreement has been signed by both the parties to it, in order to render the one who has signed it liable upon the contract (*ante*, p. * 173). The note or memorandum need not be drawn up in technical language, or in words of form; but both the subject-matter of the sale and the price to be paid for it must be specified; and it must also mention who is the purchaser. (*e*) If, therefore, upon a treaty for the purchase and sale of an estate, the owner writes a letter which amounts to a distinct offer to sell the property upon certain terms, and the party to whom the letter is addressed answers it and accepts the offer within a reasonable period, the contract is complete; and an action for damages may be maintained upon it, or the

paper secured by mortgage, by G. W. McCrary, 8 South. L. Rev. x. s. 1; Cornell v. Andrews, 15 Cent. L. J. 8, and note on Doubtful or unmarketable titles, *ib.* 9; Rayner v. Preston, 21 Am. L. Reg. x. s. 89, and note on Fire risk after sale and before delivery of possession, *ib.* 94; cases, 17 W. Va. 276, 313, 717.

(*d*) Pothier, Obligations, No. 6. Pre. Ch. 560; Ogilvie v. Foljambe, 3

(*e*) Bayley, J., Saunders v. Wake- Mer. 53; Skelton v. Cole, 1 De G. & J. field, 4 B. & Ald. 601; Blagden v. Brad- 596; Boyce v. Green, Batt. 608, bear, 12 Ves. 466; Seagood v. Meale,

owner may be compelled to perform it *in specie*. (*f*) But if there has not been a clear offer and acceptance of one and the same set of terms,—if the property has not been clearly described and defined, or any material particulars are left unsettled between the parties,—there is not a concluded contract capable of supporting an action for damages or specific performance. (*g*) Where a draft agreement had on the back of it, “We approve of this draft,” and this was signed by the intended parties to the agreement, it was held that it merely amounted to evidence of something they intended to agree to, and not to an actual agreement. “If the words,” observes Lord Tenterden, “imported an agreement, there would never be any necessity for any other instrument.” (*h*) “Still,” observes Lord St. Leonards, “where the parties themselves, not being professional persons, sign such a memorandum, it is a question to be decided in each case whether they signed in that form as simply approving of the draft as such, or whether they intended to give validity to it as an agreement.” (*i*) “It is not necessary that the note in writing, to be binding under the statute, should be contemporary with the agreement. It is sufficient if it has been made at any time and adopted by the party *afterward; and any- [* 867] thing under the hand of the party expressing that he has entered into the agreement will satisfy the statute, which was only intended to protect persons from having oral agreements imposed upon them.” (*k*)

Signature of the Writing.—The various modes of signing contracts by the party to be charged, so as to satisfy the requirements of the statute of frauds, have already been considered (*ante*, p. * 175).

Sales by Auction.¹—In the case of sales by auction, the assent of the parties to the contract of sale is manifested, as we have already seen (*ante*, pp. * 17, * 18), by the knocking down

¹ U. S. Dig. tit. *Auction*.

(*f*) *Coleman v. Upcot*, 5 Vin. Abr. 527; pl. 17; *Dunlop v. Higgins*, 1 H. L. C. 381; 12 Jur. 225.

(*g*) *Kennedy v. Lee*, 3 Mer. 451; *Thomas v. Blackman*, 1 Coll. Ch. 312.

(*h*) *Doe v. Pedgriph*, 4 C. & P. 312.

(*i*) *Sugd. Vend.* 14th ed. 144.

(*k*) *Shippey v. Derrison*, 5 Esp. 192.

of the auctioneer's hammer. The bidding is a mere offer to buy at the price named by the bidder, which offer may be retracted at any time before the hammer is down and the offer has been accepted. (*l*) A stipulation in the conditions of sale to the effect that no person shall retract his biddings, would not at common law prevent the bidder from retracting, if he thought fit so to do, before his offer had been accepted and a contract had been actually made. The vendor may, if he thinks fit, be his own auctioneer; but he cannot, unknown to the bidders, privately depute a third party to attend the sale and bid progressively for the property on his account, as a defensive precaution to prevent it from being sold at an undervalue. The employment of a single person to bid on behalf of the vendor will avoid the sale, unless the fact is notified to the assembled bidders. (*m*) And if the vendor publicly reserves to himself the right "to make one bidding and no more," through a person who is named, and then secretly employs another person to make general and repeated biddings, this is a fraud and imposition upon the parties who attend the sale, and entitles the person who is eventually declared the purchaser to abandon the contract. (*n*) Formerly there was a conflict between the courts of law and equity in respect of the validity of sales by auction where a puffer had bid, although no right of bidding was reserved, the former holding that all such sales were absolutely illegal, and the latter giving effect to them under some circumstances, although the rule was unsettled; (*o*) but by the 30 & 31 Vict. c. 48, sect. 4, "whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law." Sect. 5 of the same act requires that the particulars or conditions of sale shall state [* 868] whether the land is to be sold without * reserve, or subject to a reserve price, or whether a right to bid is reserved. If it is stated that land will be sold without reserve,

(*l*) *Payne v. Cave*, 3 T. R. 148; (*n*) *Rex v. Marsh*, 3 You. & Jerv. Warlow v. Harrison, 1 Ell. & Ell. 314; 331.

29 L. J. Q. B. 14.

(*o*) *Mortimer v. Bell*, L. R. 1 Ch. 10;

(*m*) *Parke, B., Thornett v. Haines*, 35 L. J. Ch. 25.

15 M. & W. 372; *Green v. Baverstock*,

32 L. J. C. P. 181.

or to that effect, it is unlawful for the seller to employ any person to bid at the sale, or for the auctioneer knowingly to take any bidding from such person. If a right to bid is reserved, the seller, or any person on his behalf, may bid as he may think proper. (*p*) But there is a distinction between a reserved bidding and a reserved right to bid, and in order to reserve to the vendor the right to bid up to the reserved price, such right must be expressly stipulated for, and it is not sufficient to state in the conditions that the sale is subject to a reserved bidding. (*q*) The effect of employing any one to bid when the sale is "without reserve is, that the sale is void, and the purchaser is entitled to recover back his deposit from the auctioneer." (*r*) The term "without reserve" is understood "to exclude all interference by the vendor or those coming under him with the right of the public to have the property at the highest bidding." Any arrangement, therefore, between the vendor and a third party, the result of which is to prevent the property from being sold under a fixed sum, will render the sale null and void. (*s*) When the vendor inserts in the conditions of sale that the property is to be sold "without reserve," he by so doing contracts with the highest *bona fide* bidder that the sale shall be without reserve. If, therefore, a bid is made by or on behalf of the vendor or the owner of the property, the latter may render himself responsible in damages to the highest *bona fide* bidder for a breach of the conditions of sale. (*t*) But the auctioneer is not responsible for a breach of the condition, unless he has himself made a representation false to his knowledge, and has thereby induced the plaintiff to incur expense and loss, as there is no contract between the auctioneer and the highest bidder that the property offered for sale shall be knocked down to him. (*u*)

As, on the one hand, the seller cannot employ secret bidders to run up the price and delude the purchaser with a fictitious

(*p*) 30 & 31 Vict. c. 48, sect. 6. *Thornett v. Haines*, 15 M. & W. 367; These sections are not to affect sales of land under the order of the Court of Chancery. As to such sales, see sect. 7, and *In re Bartlett*, 16 Ch. D. 561. (*s*) *Robinson v. Wall*, 16 L. J. Ch. 401.

(*q*) *Gilliat v. Gilliat*, L. R. 9 Eq. 60; 39 L. J. Ch. 142. (*t*) *Warlow v. Harrison*, *supra*. (*u*) *Mainprice v. Westley*, 6 B. & S. 420; 34 L. J. Q. B. 229.

(*r*) *Meadows v. Tanner*, 5 Mad. 34; 420; 34 L. J. Q. B. 229.

contest, so, on the other hand, if a purchaser by his conduct induces other persons not to bid, the sale will not be binding on the vendor. (x) Where the known agent of the vendor was employed by the purchaser to attend a sale by auction and [* 869] bid *for him, and was thought by the assembled company to be a puffer, which deterred other persons from bidding, and the estate was knocked down to the agent under the false impression that he was acting for the vendor, the Court of Chancery refused to assist the purchaser to enforce the contract, as the employment of the vendor's agent by the purchaser had hurt the sale and had been detrimental to the vendor. (y) As soon as the hammer of the auctioneer is down, and the bidding has been accepted, an agreement for the sale and purchase should be signed by the parties themselves, or by the auctioneer as their agent, inasmuch as sales by auction are, as we have before seen, within the statute of frauds, and must, whenever the subject-matter of the sale consists of an estate or interest in land, be authenticated by a signed writing (*ante*, pp. * 159, * 866). The printed conditions of sale, containing the terms on which the purchaser bids and the vendor accepts his bidding for the estate, form, when signed, a written contract between the vendor and purchaser sufficient to satisfy the requirements of the statute of frauds; and the auctioneer's receipt for the deposit, signed by him, will amount to an agreement binding upon the seller, if it contains the names of the seller and purchaser, a description of the estate sold, and the price to be paid, or if it refers to the conditions or particulars of sale, so as to enable the court to read them together as one contract (*ante*, pp. * 172-174).

When an estate is sold by auction in separate lots, a separate contract is created as to each lot. (z) But it is otherwise if a contract is made for the purchase of several lots at one aggregate price, or if the several lots are so connected together that the possession of all is essential to the use and enjoyment of any one or more of them, and they have, consequently, been pur-

(x) *Fuller v. Abrahams*, 6 Moore, 316; 3 B. & B. 116. (z) *Emmerson v. Heelis*, 2 Taunt. 38; *James v. Shore*, 1 Stark. 426; *Roots*

(y) *Twining v. Morrice*, 2 Bro. Ch. C. 331. *v. Lord Dormer*, 4 B. & Ad. 77.

chased by the vendee as one property. (a) We have already seen that an auctioneer effecting a sale by auction, or an auctioneer's clerk taking down the bidding, is deemed to be the authorized agent both of the vendor and purchaser, so as to be enabled to bind both or either of the parties by signing their names to the printed conditions of sale; but until the hammer goes down, the auctioneer is exclusively the agent of the vendor; (b) and when the sale is over, the auctioneer is no longer the agent of either party. (c) But he is not necessarily the agent of both parties; for it may be shown that the purchaser bought under an express * contract between [* 870] him and the vendor, and not under the conditions of sale. (d) The auctioneer generally puts down the purchaser's name in his catalogue, or in the conditions or particulars of sale, with the amount of the bidding opposite the lot purchased; or he makes an entry of the particulars in his books, inserting the name of the purchaser. In either case the latter will be bound. If the conditions of sale are pasted up in a conspicuous position in the auction-room, the purchaser will be bound by the terms and conditions, although it cannot be proved that he read them. (e) These conditions cannot be contradicted, added to, or altered by verbal declarations made by the auctioneer at the time of the sale. (f) The reading of a lease at an auction by an auctioneer is no excuse for a misdescription of the terms of the lease in the particulars or conditions of sale. (g) If the estate is sold by order of the Court of Chancery, and a bidder who is declared the purchaser sells again in the auction-room at an additional price, the court will order a resale. (h) If the auctioneer at a sale does not disclose the name of the vendor, but makes the contract in his own name, he will himself be personally responsible for the fulfilment of the contract. (i) And even

(a) *Chambers v. Griffiths*, 1 Esp. 150; *Gibson v. Spurrier*, 2 Peake, N. P. C. 49; *Boyer v. Blackwell*, 3 Anstr. 657; *Dykes v. Blake*, 4 Bing. N. C. 463; 6 Sc. 345.

(b) *Warlow v. Harrison*, *ante*, p. * 868.

(c) *Mews v. Carr*, *ante*, p. * 177.

(d) *Bartlett v. Purnell*, 4 Ad. & E. 794.

(e) *Mesnard v. Aldridge*, 3 Esp. 271; *Bywater v. Richardson*, 1 Ad. & E. 508.

(f) *Higginson v. Clowes*, 15 Ves. 521.

(g) *Jones v. Edney*, 3 Campb. 286; *Flight v. Booth*, 1 Bing. N. C. 379.

(h) *Holroyd v. Wyatt*, 2 Coll. C. C. 327.

(i) *Franklyn v. Lamond*, 16 L. J. C. P. 221; 4 C. B. 637.

where he does disclose the name of the principal, yet if it appears from the terms of the contract that he is dealing personally with the purchaser, he will be personally bound. (*k*)

Of the Enforcement of Oral Contracts for the Sale and Purchase of Estates.¹—If livery of seisin is made to a purchaser under an oral contract for the sale of a freehold estate, or of a leasehold estate exceeding three years in duration, and he is actually put into possession of the property agreed to be sold to him, yet he will have only an estate or lease at will, by reason of the fourth section of the statute of frauds, which enacts, as previously mentioned, that all estates of freehold or terms of years, or any uncertain interest in lands, tenements, or hereditaments made or created by livery and seisin only, or by parol, and not put into writing and signed by the parties creating them, or their agents, shall have the force and effect of leases or estates at will only, excepting leases not exceeding the term of three years from the making thereof. But the purchaser so let into possession will be entitled to a conveyance of the estate;

and the court will compel the vendor to execute such a [* 871] conveyance, * notwithstanding the provisions of the statute of frauds, on the ground that there has been a part performance of the contract, and that, possession having been given and accepted in fulfilment of the bargain, it would be fraudulent in either party to withdraw therefrom without the consent of the other. (*l*) The equity arising from part performance operates against a company in like manner as against an individual, the enactments of the Companies Clauses Act, 1845, as to the mode in which contracts may be entered into on behalf of a company not precluding the enforcement against a company of the ordinary equity based on part performance. (*m*) The mere naked transfer of the possession of land alone is not, it has been said, sufficient to justify the courts in enforcing the

¹ See this subject treated again, *post*, pp. * 901, * 1120.

(*k*) *Wolfe v. Horne*, 2 Q. B. D. 355; 1 *Younge*, 352; *Caton v. Caton*, L. R. 1 Ch. 137, 148; 35 L. J. Ch. 292, 295. *see ante*, p. * 62.

(*l*) *Butcher v. Stapely*, 1 Vern. 364; (*m*) *Wilson v. West Hartlepool Ry. Co.*, 2 De G. J. & S. 475; 34 L. J. Ch. Pyke v. Williams, 2 ib. 455; *Fonblanque*, 175, n.; *Reynolds v. Waring*, 241.

performance of an oral contract for the purchase of the freehold and inheritance of such land on the ground that the transfer of the possession is a part performance of such oral contract. Acts done in performance, it has been observed, must be such as could have been done with no other view or design than to fulfil the particular contract sought to be enforced. (n) If, indeed, the change of possession is accompanied by the payment of money on the part of the occupier to the owner, under circumstances giving rise to the presumption that it was an instalment of purchase-money, and not a rent paid in advance, there would undoubtedly be a part performance of a contract, which could be no other than a contract of sale. (o) So if the change of possession has been accompanied by the exercise of acts of ownership, such as the expenditure of money in building, repairs, drainage, and lasting improvements, quite inconsistent with the notion of a contract for a yearly tenancy, it is evident from the acts done that there has been a part performance either of a contract for the purchase of the fee, (p) or for the grant of a lease for a long term of years. (q) Such acts as are ordinarily introductory or ancillary to contracts for the purchase and sale of an estate or interest in land, such as the giving of directions for a conveyance to be prepared, making valuations, or fixing upon parties to value fixtures or stock, or the making of admeasurements, or the preparing of maps or plans, are not acts of performance of an oral agreement for the purchase or sale of an * estate or interest in land, sufficient to take [* 872] the contract out of the statute. (r) But if "the purchaser of lands under an oral contract files a bill against the vendor to carry such contract into execution, and the vendor

(n) *Gunter v. Halsey*, Amb. 586; (p) *Borrett v. Gomeserra*, Bunb. 94.
Cole v. White, cited 1 Bro. Ch. C. 409; (q) *Sutherland v. Briggs*, 1 Hare, 26;
Alderson v. Maddison, 7 Q. B. D. 174; *Thornton v. Ramsden*, 4 Giff. 519;
Reynolds v. Waring, 1 Younge, 350; *Nunn v. Fabian*, L. R. 1 Ch. 35; 35 L.
O'Reilly v. Thompson, 2 Cox, 273; J. Ch. 146.
Clinan v. Cooke, 1 Scho. & Lef. 22; (r) *Clerk v. Wright*, 1 Atk. 13;
Watt v. Evans, 4 Y. & Coll. 579; but *Cooke v. Tombs*, 2 Anstr. 420; *Whit-*
see Wilson v. West Hartlepool Ry. Co., church v. Bevis, 2 Bro. Ch. C. 559; *Red-*
2 De G. J. & S. 475. ding v. Wilkes, 3 Bro. Ch. C. 400;
(o) *Main v. Melbourne*, 4 Ves. Jun. *Phillips v. Edwards*, 33 Beav. 440.
720; *Coles v. Trecothick*, 9 ib. 234.

puts in an answer admitting the contract as stated, it takes it entirely out of the mischief of the Statute of Frauds, and, there being then no danger of perjury, the court would decree it to be performed." (s)

Of the Transfer of the Estate in Equity by the Bargain before the Execution of a Conveyance.—The execution of a simple contract in writing for the sale and purchase of an estate in fee, although accompanied by livery and seisin, or delivery of possession of the land to the purchaser, does not, since the passing of the Transfer of Property Act, transfer to the latter the legal estate or interest agreed to be sold. The written contract, if it amounts to a grant of the fee, would be a feoffment, and would be avoided by the section of the act (ss) which enacts that "a feoffment (other than a feoffment made under a custom by an infant) shall be void unless evidenced by DEED." A right to have a conveyance of the land passes by the contract to the purchaser, but not any legal estate or interest in the land itself beyond an estate at will. It is not necessary, however, for the alienation of property that there should be a formal deed of conveyance; a contract for a valuable consideration, by which it is agreed to make a transfer of particular specified property, passes the beneficial interest, provided the contract is one which would be specifically enforced. (t) "The estate, from the signing of the contract, becomes the real property of the vendee. It is vendible as his, chargeable as his, capable of being incumbered as his, devised as his; it may be assets, and will descend to his heir." (u) The purchaser, therefore, in such a case is said to have the equitable interest in the land, whilst the vendor has the legal estate, and is deemed to be a trustee for the purchaser, (x) holding the land upon trust to convey it to the latter upon the terms and conditions of the contract of sale, (y)

(s) *Att.-Gen. v. Day*, 1 Ves. Sen. 220; *Gunter v. Halsey*, Ambl. 586; *Rondeau v. Wyatt*, 2 H. Bl. 68.

(ss) 8 & 9 Vict. c. 106, sect. 3.

(t) *Holroyd v. Marshall*, 10 H. L. C. 191; 33 L. J. Ch. 193.

(u) *Lord Eldon, Seton v. Slade*, 7 Ves. 274.

(x) Where the vendor of a farm could not complete, and the farm was left without a tenant, it was held the duty of the vendor, as trustee for the purchaser, to relet it. *Earl of Egmont v. Smith*, 6 Ch. D. 469.

(y) *Davie v. Beardsham*, 1 Ch. C. 39.

whilst the purchaser is a trustee of the purchase-money for the vendor. (z)

This transfer of the equitable ownership is naturally accompanied with a corresponding transfer of the risk of loss, so that *if lands and houses are agreed to be sold, and [* 873] the houses are burned down by fire or destroyed by an earthquake between the time of the making of the contract of sale and the execution of a conveyance of the legal estate, the loss will fall upon the purchaser, who will be compelled to accept a conveyance of the land without the houses, and to pay the full amount of the purchase-money to the vendor; (a) nor will he be entitled to the benefit of any insurance effected by the vendor in the absence of an express stipulation to that effect in the agreement for the purchase. (b) So if a simple contract be entered into for the sale of an estate holden for two lives, and one of the lives drops before the conveyance is executed, the loss will be the loss of the purchaser. (c) And if a man signs an agreement for the purchase of an annuity payable during the life of a third party, and the latter "happens to die before the annuity is legally transferred to the purchaser, the death can form no objection to the specific performance of the contract," (d) and the purchaser must pay his money, although he can never enjoy that for which it was agreed to be paid. If, on the other hand, any profit or gain accrues, it will belong to the purchaser. Therefore if a reversionary interest is agreed to be purchased, and lives drop between the time of the making of the agreement and the execution of a conveyance, the purchaser will

(z) *Green v. Smith*, 1 Atk. 572; *Pollexfen v. Moore*, 3 Atk. 273.

(a) *Harford v. Purrier*, 1 Mad. 538, 539; *Rawlins v. Burgis*, 2 Ves. & B. 387; *Paine v. Meller*, 6 Ves. 353; *Cass v. Radele*, 2 Vern. 280; *Poole v. Adams*, 33 L. J. Ch. 639.

(b) *Poole v. Adams*, 33 L. J. Ch. 639; *Collingridge v. Royal Ex. Ass. Co.*, 3 Q. B. D. 173; *Edwards v. West*, 7 Ch. D. 858; *Rayner v. Preston*, 14 Ch. D. 297; 17 Ch. D. 1, C. A.; *Castellain v. Preston*, 8 Q. B. D. 616.

(c) *White v. Nutts*, 1 P. Wms. 62.

So by the civil law, "cum autem emptio et venditio contracta sit, periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. Itaque, si aut ædes totæ vel aliqua ex parte incendio consumptæ fuerint, emptoris damnum est, cui necesse est, licet rem non fuërit nactus, pretium solvere. Sed et si post emptionem fundo aliquid ad emptoris commodum pertinet: nam et commodum ejus esse debet cujus periculum est." — *Instit. lib. 3, tit. 24, sect. 3.*

(d) *Kenney v. Wexham*, 6 Mad. 357.

have the benefit of it. (e) If an estate is sold for an annuity to be paid by the purchaser during the life of the vendor, and the vendor dies after the signing of the agreement, and before the execution of the conveyance, the purchaser will, nevertheless, remain the equitable owner of the property, and will be entitled to call upon the heir at law of the vendor for a conveyance of the legal estate; and he may thus acquire the property without the payment of a single shilling of money. (f) But he must not sleep over his rights. (g) And it must be observed that, if the annuity becomes due before the death of the vendor, and the purchaser has neglected to pay it, or tender payment, the court will render him no assistance. (h) But the simple contract [* 874] of purchase and sale must, of course, be a complete and concluded contract, in order to transfer the right of property and the risk of loss to the purchaser. In the case of judicial sales by the court in the Master's office, the contract of sale is not considered to be concluded until the Master's report is confirmed as to the party who is the best purchaser, and the title is accepted, and in some cases not until the purchase-money is brought into court or paid into the bank. (i) In order to transfer the right of property and the risk of loss, it must also appear that the vendor had a good title at the time of the making of the contract, or before the disaster happened, and that he was clothed with the estate or interest he agreed to sell; for if he had not himself got the estate, it cannot, of course, have passed to the purchaser. Where a vendor had himself purchased property from a railway company which the company had no right to sell, and one condition of the resale was that the purchaser must send in his objections to title in seven days, and he did not object until after seven days, it was held that he was too late, and must forfeit his deposit; for the vendor had something more than a revocable license, he had a possessory title to the thing he proposed to sell. (k) A purchaser who

(e) *Ex parte Manning*, 2 P. Wms. 410.

(f) *Mortimer v. Capper*, 1 Bro. C. C. 156; *Jackson v. Lever*, 3 ib. 604.

(g) *Wyvill v. Bishop of Exeter*, 1 Pr. 292.

(h) *Pope v. Roots*, 1 Bro. P. C. 370.

(i) *Twigg v. Fifield*, 13 Ves. 518;

Vincent v. Going, 3 Dru. & W. 75; *Mackrell v. Hunt*, 2 Mad. 34, n.

(k) *Rosenberg v. Cook*, 8 Q. B. D. 162.

exercises acts of ownership over the land agreed to be purchased must pay interest on the purchase-money, although he receives no actual profits, and the delay in completion may be caused by the vendor. (*l*)

Title under the Land Transfer Act. — Before treating of the production of title and the requisites of a good title, &c., mention must be made of the Land Transfer Act, although it is believed that owners of property have not largely availed themselves of its complicated provisions, and therefore it is thought unnecessary to treat fully of them. It is sufficient here to point out that by the Land Transfer Act, 1875, (*m*) entitled an Act to simplify Titles and facilitate the Transfer of Land in England, provisions are made with respect to the registration of freehold land or leasehold held under a lease derived out of freehold, (*n*) and for the transfer of such lands, (*o*) and their transmission on death, or bankruptcy, or marriage. (*p*)

Of the Production and Proof of the Vendor's Title. — It is the first duty of the vendor, when an executory contract of sale has been concluded, to prepare and show to the purchaser satisfactory evidence of title. "An agreement to make out a good title is * implied from every contract for the sale of [* 875] realty ;" (*q*) and a purchaser is not bound to accept a doubtful title. If no precise time is fixed within which the title is to be deduced, the vendor will have a reasonable time for its establishment. (*r*) He may, if he thinks fit, stipulate for the sale of an estate with such a title only as he happens to have ; and in such a case the purchaser will be bound to take whatever interest the vendor has in the premises, whether freehold, leasehold, or copyhold. (*s*) The vendor must furnish, at his own expense, an abstract of his title, consisting of a written statement containing with sufficient fulness the effect of every in-

(*l*) *Ballard v. Shutt*, 15 Ch. D. 122.

(*m*) 38 & 39 Vict. c. 87.

(*n*) Sect. 2 ; customary freehold in certain cases shall not be deemed freehold.

(*o*) Sects. 29-39.

(*p*) Sects. 41-48 ; sect. 87.

(*q*) *Hall v. Betty*, 4 M. & Gr. 410 ; 5 Sc. N. R. 508 ; *Dick v. Donald*, 1 Bligh, N. S. 655.

(*r*) *Sansom v. Rhodes*, 6 Bing. N. C. 261 ; 8 Sc. 544.

(*s*) *Freme v. Wright*, 4 Mad. 364 ; *Duke v. Barnett*, 2 Coll. C. C. 337.

strument which constitutes part of his title. (*t*) The abstract ought, apart from the statute, *infra*, to show the state of the title for at least sixty years immediately preceding the contract of sale. (*u*) By the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), sect. 1, in the completion of any contract of sale of land, made after the 31st day of December, 1874, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless, earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required. Upon a sale of leasehold property without any condition protecting the vendor against the production of deeds, the vendor is bound to produce the lease which is the root of his title, although the lease is more than sixty years old. (*x*) By sect. 2 (1) of the above statute: Under a contract to grant or assign a term, a lessee or assign is not entitled to call for the title to the freehold. Under the old law the vendor was not bound to abstract, at his own expense, deeds more than sixty years old, when a good title for sixty years was apparently deduced. But when any circumstance transpires throwing a serious doubt upon the title as deduced, the vendor must then be at the expense of bringing forward farther and earlier evidence to remove the doubt (see now as to expenses, *post*, p. * 883).

By the above statute, sect. 2, —

- (2) Recitals, &c., contained in deeds, &c., twenty years old * shall, unless proved to be inaccurate, be taken to be true. (*y*)
- [* 876]
- (3) Inability of vendor to give a legal covenant to produce title shall not be an objection if on completion the purchaser will have an equitable right to the production.

(*t*) *Oakden v. Pike*, 34 L. J. Ch. 620; (*x*) *Frend v. Buckley*, L. R. 5 Q. B. 213; 39 L. J. Q. B. 90.
Want v. Stallibrass, L. R. 8 Ex. 175; 42 L. J. Ex. 108.

(*u*) *Cooper v. Emery*, 1 Phill. 388.

(*y*) See *Bolton v. London School Board*, 7 Ch. D. 766.

(4) Covenants required by purchaser are to be at his expense.

(5) Where vendor retains part of estate, he may retain the documents referring to it.

A delivery of the vendor's title-deeds themselves is not equivalent to the delivery of an abstract of title. (z) But the right of the purchaser to have an abstract may, of course, be waived; and if the agreement for the purchase provides for the delivery of an abstract to the purchaser at the vendor's expense, this stipulation may be waived by an acceptance on the part of the purchaser of the title-deeds themselves, and a perusal and consideration of them and approval of the title on the part of the purchaser's attorney or counsel; but the fact of the approval and of the waiver of the delivery of the abstract must be established through the medium of letters and written evidence of the same legal character and importance as that by which the contract itself is authenticated, and cannot be established through the medium of oral testimony.

A proviso that, in case the vendor cannot deduce a good title or the purchaser shall not pay the money on the appointed day the agreement shall be void, does not enable either party to vitiate the agreement by refusing to perform his part of it. The meaning is that, if the vendor cannot make out a title, the purchaser shall be at liberty to be off the bargain; and so *e contra*, if the purchaser is not ready with the money, the vendor may refuse to carry out the contract; but "the purchaser cannot say, 'I am not ready with my money; therefore I will avoid the contract;' nor can the vendor say, 'My title is not good; therefore I will be off.'" (a) Where there is a proviso that if the purchaser shall raise objections to the title which the vendor shall not be able or willing to remove, the vendor shall be at liberty to rescind the contract, the vendor, when the objections are sent in, must determine which of the two courses he will adopt. If he expresses his willingness to remove the objections, he is for ever thereafter precluded from exercising the option given him to rescind the contract. (b) If the time for making objections to

(z) *Horne v. Wingfield*, 3 Sc. N. R. 340.

(a) *Roberts v. Wyatt*, 2 Taunt. 277.

(b) *Tanner v. Smith*, 10 Sim.

the title is limited, the limitation is waived by the vendor's receiving and considering the objections after the time [* 877] * appointed, provided the fact can be established through the medium of letters or any evidence in writing. (c) Where, after notice of rescinding the contract, a correspondence on the title is continued under protest, this gives to the transaction the character of a treaty for the renewal of the rescinded contract. (d) If it is provided that no farther evidence of the identity of the parcels shall be required beyond what is afforded by the title-deeds and documents abstracted, and the descriptions in the documents differ, the purchaser is entitled to farther proof of identity. (e) If it is provided that no other title shall be required than that deduced by a particular abstract, the purchaser is not precluded from objecting to the title as it appears upon the face of the abstract. (f) If a party sells an estate without having a title, but before he is called upon to make a conveyance gets such an estate as will enable him to make a title, that is sufficient. (g)

Of the Title to Realty.¹ — Changes of an important character have been effected with regard to questions of title by the Con-

¹ Abstracts of title are scarcely mentioned in American reported decisions; but some account of their use in this country may be gathered from a few of the text-books on conveyancing and real property. See also articles describing them in 14 Am. L. Reg. n. s. 543, and 8 West. L. J. 257.

Use of an Abstract. — An abstract of title is a memorandum or concise statement of the conveyances or incumbrances affecting the ownership of real property. 1 Abb. L. Dict. 6.

In the United States, furnishing an abstract is not deemed obligatory; use of abstracts is regulated by convenience and courtesy; unless the contract of sale requires one, the vendor's obligation is discharged by tender of a deed, he having a good title. Abb. Forms, C. C. A. 3, note a. There is, however, some recognition of the English custom, that the vendor's counsel prepares an abstract at the vendor's expense, and the purchaser's counsel examines it at the purchaser's expense. Will. R. E. 527. How long the latter may retain it, and his duty to return it, see ib.

Usage in New York as to examination of abstracts, and the evidence deemed sufficient to establish the statements of one. Will. R. E. 556.

(c) *Cutts v. Thodey*, 13 Sim. 206.

(d) *Southcomb v. Bishop of Exeter*, 6 Hare, 213; 16 L. J. Ch. 378; 11 Jur. 275.

(e) *Flower v. Hartopp*, 6 Beav. 476; *Nicholl v. Chambers*, 21 L. J. C. P. 54.

(f) *Sellick v. Trevor*, 11 M. & W.

729. And it is so notwithstanding the new act; see *Wolstenholme & Turner's Conveyancing Act*, p. 14, n. (a).

(g) *Thompson v. Miles*, 1 Esp. 185.

veyancing and Law of Property Act, 1881; but wherever sect. 3 of the act is referred to, the reader must remember that, — (1) the

What Period it should Cover. — Theoretically, an abstract should begin at some date anterior to the time from which adverse possession is, by the statute of limitations, equivalent to a perfect title; practically, allowance must be made in addition for possible claims of persons under disabilities. Abb. Forms, C. C. A. 4.

In the older States, an abstract should generally begin sixty years back; but an abstract is sufficient which traces title back to the patent from the United States. Cur. Abs. T. sect. 30.

Abstract of a title derived from the government will begin with the patent (Cur. Abs. T. sect. 38); except in States where an equitable title anterior to the patent is recognized (ib. sect. 39).

Not usually necessary in New York to carry abstract back to colonial patent. Will. R. E. 552.

The English rule of beginning sixty years back is derived, by analogy, from the statute of limitations against a writ of right, fixed at sixty years by 32 Hen. VIII. c. 2; and applying same principle under New York law would shorten the period to forty years, the longest limitation there. Code Pro. sect. 75; Will. R. E. 527.

Formal Requisites; Caption, Paper, &c. — Proper mode of drawing caption, commencement, or heading of abstract of title, with an example. Abb. Forms, C. C. A. 5; Will. R. E. 551.

If the duty and responsibility of the conveyancer are limited by instructions of his client, the fact should appear in the caption. Abb. Forms, C. C. A. 4.

Advantage of making accurate sketch of the land before commencing search or abstract; and how it should be made. Abb. Forms, C. C. A. 5; Cur. Abs. T. sect. 36.

Practical instructions for computing area of lands of various shapes, and for detecting mistakes in conveyancers' or surveyors' descriptions. Cur. Abs. T. sects. 16-22,

Abstract should be fairly written on usual paper; one written illegibly, or on inconvenient paper, may be refused. Will. R. E. 551.

The parts of each instrument under which the title is claimed should be stated truly and in its language; the lines should be open enough to admit interlineations, and the margin broad enough to admit notes. Will. R. E. 551.

Not usual in New York to annex full copies of deeds or wills to abstracts. Will. R. E. 551.

Proper Contents in General. — An abstract should answer all reasonable inquiries, and be sufficiently methodic and lucid to enable a qualified person to form opinion on the chain of title as he reads. Abb. Forms, C. C. A. 5; and see Will. R. E. 551.

The object of an abstract of title is to furnish a statement of every fact, and a minute of the contents of every deed or record essential to the validity and marketableness of the title; what it should contain explained in detail, with examples. Cur. Abs. T. sect. 37.

The object of the abstract is to enable the purchaser to judge of the sufficiency of the title and of any incumbrances; it should describe whatever will aid to form an opinion of the precise state of the title at law or in equity, with all chances of eviction, or even of adverse claim. Will. R. E. 527.

The abstract is like a brief of facts prepared by counsel for the trial of a cause when the object is to establish or defend the title. Skeleton or example of an abstract as clear as is usual in American practice. Will. R. E. 552.

Simplicity of New York law of real estate compared with English, renders

section applies only to sales properly so called; (2) only if and as far as the contract of sale does not interfere; (3) only to sales

preparation of abstract and examination of title less complex and difficult. Will. R. E. 528.

What particulars ought to be stated in abstracting deeds explained in detail, with reference to the general American law of real property (Cur. Abs. T. sect. 40); variations proper under statutes of Pennsylvania, Ohio, Kentucky, Indiana, Illinois, Iowa, Kansas, *ib. sects. 41-47*.

Proper manner of naming in abstract the parties to a conveyance. Cur. Abs. T. 48.

Proper manner of indicating in an abstract the descriptions of premises contained in various deeds (Cur. Abs. T. sect. 52); and how the searcher should treat imperfect, false, or erroneous descriptions (*ib. sects. 53-55*); declarations of trust (*ib. sects. 56, 57*); reservations of rents (*ib. sect. 58*); conditions and limitations, or restrictive covenants (*ib. sects. 59-65*).

Proper manner of indicating the covenants usual in deeds of bargain and sale. Cur. Abs. T. sect. 66; *e. g.* of seisin (*ib. sect. 67*); title (*ib. sect. 68*); quiet enjoyment (*ib. sect. 69*); against incumbrances (*ib. sect. 70*); that conditions have been performed (*ib. sect. 71*).

Abstract should mention all recitals in deeds which can be important, either as notice to the purchaser, or as raising an estoppel against him. Cur. Abs. T. sect. 72.

Proper manner of indicating the signing, sealing, and attestation of the deeds (Cur. Abs. T. sect. 73); also any alterations, &c., in the original (*ib. sect. 75*).

What particulars ought to be stated in abstracting a lease (Cur. Abs. T. sect. 114); with reference to leases which have been assigned (*ib. sect. 115*); to mining and oil-well leases (*ib. sects. 116-119*).

What particulars ought to be stated in abstracting a judicial record, explained in detail with reference to the general American law of real property. Cur. Abs. T. sect. 104.

Proper mode of indicating, in an abstract of a title made under judicial sale, the course of proceedings (Cur. Abs. T. sect. 100); how jurisdiction was acquired of the subject-matter (*ib. sect. 101*); of the person (*ib. sect. 102*); the judgment, levy, sale, deed, &c. (*ib. sect. 103*).

Proper mode of ascertaining and showing a title acquired under a judicial sale, or sale under a power. Will. R. E. 544.

What particulars ought to be stated in abstracting wills or devises, explained in detail, with reference to the general American law of real property (Cur. Abs. T. sects. 105, 106); variations proper under statutes of Pennsylvania (*ib. sect. 107*); Ohio (*ib. sect. 108*); Kentucky (*ib. sect. 109*); Indiana (*ib. sect. 110*); Illinois (*ib. sect. 111*); Iowa (*ib. sect. 112*); Kansas (*ib. sect. 113*).

What demands are liens upon land as against a purchaser (Cur. Abs. T. sect. 90); and the duty and proper course of a conveyancer in searching for and abstracting liens in favor of the United States (*ib. sect. 91*); Pennsylvania (*ib. sect. 92*); Ohio (*ib. sect. 93*); Kentucky (*ib. sect. 94*); Indiana (*ib. sect. 95*); Illinois (*ib. sect. 96*); Iowa (*ib. sect. 97*); Kansas (*ib. sect. 98*).

Practical explanations as to liens and incumbrances upon real property, with special reference to preparation of abstracts and to certifying titles. Will. R. E. 529.

How far and in what manner an abstract ought to disclose facts affecting the title which are not matter of record or documentary proof, such as marriage,

made after 31st December, 1881; and (4) lastly, the purchaser need not complete if, on a contract containing stipulations similar to the section, specific performance would not be enforced.

An agreement to sell a house or land generally, not specifying the estate or interest of the vendor, is in contemplation of law an agreement to sell an estate in fee; and the purchaser may refuse to complete his contract, if the vendor is unable to make out a title to, and convey, such an estate. (*h*) But if the abstract of title, when delivered, shows that the vendor is possessed only of a life estate or a term of years, and the purchaser, after the delivery of such abstract, proceeds with the purchase and accepts the title, the contract will be deemed to be a contract for the sale and purchase of the estate and interest disclosed upon the face of the abstract. So if a vendor contracts for the sale of leasehold property held under a lease, he must show that it is held under an original lease; but where the particulars and conditions of sale show that the property is held under a derivative lease, the * purchaser cannot refuse to complete or claim com- [* 878] pensation. (*i*) If the agreement specifies the precise nature of the estate or interest bargained for and agreed to be sold, and the abstract discloses a title to a different estate in the same land, and the purchaser accepts the title in writing, the contract for the sale and purchase of the first-named estate will be deemed to be abandoned, and a new contract set up for the purchase of the interest disclosed upon the face of the abstract. But an oral acceptance of the title, and an oral agreement to accept such subsequently disclosed interest in lieu of the estate originally bargained for, cannot be set up in opposition to the

alienage, adverse possession, and extent of conveyancer's duty in ascertaining such facts. Abb. Forms, C. C. A. 4.

For accounts of the abstract of title as employed in English conveyancing of former years, see Dart, *Vend. & P.* (Am. ed. 1851) 58, 126, 130, 131, 134, 140, 147, 149, 162, *ib.*; (5th Eng. ed.) 125, 126, 155, 162, 279, 281, 286, 304, 306, 310, 931, 1197, 1208; Dixon, *Title-Deeds*, c. 11, *Abstracting*; Gardnor, *Directions for Drawing Abstracts of Title*; Harper, Lee, Moore, Preston, *on Abstracts of Title*; 1 Steph. Com. (8th ed.) 482, note *g*, *ib.* (6th ed.) 507, note *s*; Sugd. *Vend. & P.* c. 11; *The abstract, &c.*, 1 *ib.* 365; 2 *ib.* 406-412, 428; Whart. *Conv. c. 7*, *The abstract and its requisites*; Williams, R. P. (12th ed.) 449-451, 527, 539, 541.

(*h*) *Hughes v. Parker*, 8 M. & W. 244.

(*i*) *Camberwell Building Society v. Holloway*, 13 Ch. D. 754.

original contract. (*k*) A contract to make a good title to an estate means, of course, a title good both at law and in equity. (*l*) If, therefore, the vendor has only a naked legal title as a trustee, or a mere equitable interest without the legal estate, the contract as to title is not fulfilled. (*m*) A title may be good, and the purchaser be compelled to complete the purchase, although there may be no title-deeds to produce. "There are good titles, of which the origin cannot be shown by deed or will; but then you must show something that is satisfactory to the mind of the court that there has been such a long, uninterrupted possession, enjoyment, and dealing with the property, as affords a reasonable presumption that there is an absolute title in fee-simple." (*n*) Although a conveyance, voluntary upon the face of it, is *prima facie* void against a subsequent purchaser for value, yet it may become valid by force of subsequent events; (*o*) and, therefore, a purchaser is not bound to take a title where there appears to have been such a conveyance, but may decline to complete, and may recover his deposit. (*p*) If a conveyance to a purchaser has been accidentally burned, the vendor, if living, will be compelled to execute a fresh conveyance and supply the defect in the title occasioned by the accident. (*q*)

By the Conveyancing and Law of Property Act, 1881, which takes effect from the 31st day of December, 1881, sect 3 (2), where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement. (*r*) Where land sold is held by lease (not including underlease) the purchaser is to assume the lease was duly granted, and on [* 879] production of * receipt for rent that all covenants have

(*k*) *Deverell v. Lord Bolton*, 18 Ves. 510.

(*l*) *Maberley v. Robins*, 1 Marsh. 258; 5 Taunt. 625; *Jeakes v. White*, 21 L. J. Ex. 265; *Boyman v. Gutch*, 7 Bing. 279.

(*m*) *Elliott v. Edwards*, 3 B. & P. 183; *Cane v. Baldwin*, 1 Stark. 65.

(*n*) *Cottrell v. Watkins*, 1 Beav. 365; *Scott v. Nixon*, 3 Dru. & W. 405.

(*o*) *Prodgers v. Langham*, 1 Sid. 133.

(*p*) *Clarke v. Willott*, L. R. 7 Ex. 313; 41 L. J. Ex. 197.

(*q*) *Bennett v. Ingoldsby*, Finch, 262.

(*r*) 44 & 45 Vict. c. 41, sect. 3 (2); nor can he require the production of deeds, &c., recited in the enfranchisement, sect. 3 (3).

been performed. (s) In case of underlease he is to assume that it and every superior lease were duly granted, and on production of receipt for rent under underlease, that all covenants have been performed, and that rent due under superior leases has been paid. (t)

Of the Period for which the Title ought to be shown.—By the Vendor and Purchaser Act, 1874, (u) by sect. 1, forty years is substituted for sixty years for the commencement of title which a purchaser may require subject to any stipulation in the contract to the contrary. (x) As an estate for life may last sixty years, and thirty years more may be required, in case of disabilities, to bar the claim of the remainder-man, it is obvious that the period of sixty years for which the title is, by the general practice of the profession, required to be carried back is not too long, and that a purchaser would not be safe in limiting his researches to a shorter space of time. The statute of limitations (3 & 4 Wm. IV. c. 27), consequently, although it has made a sixty years' title a better title than it was before, has in nowise abridged the time for which the title must be shown; and every purchaser is still entitled, if he makes a contract to that effect, to the production of a sixty years' title on the part of the vendor. (y) An oral stipulation that the title is not to be made out beyond a limited period cannot, as previously mentioned, be engrafted upon a written contract which makes no mention of such a stipulation; but if a notice in writing to that effect can be proved to have been given to the purchaser prior to the making of the contract, the latter must accept the title as limited, unless he can show that he had refused to be bound by the notice, and had declined to treat on the terms sought to be imposed upon him. (z) By the Conveyancing and Law of Property Act, 1881, which takes effect from and after 31st December, 1881, a purchaser is not to require the production, or any abstract, or copy of any document, nor make inquiry as to such, dated before the

(s) Sect. 3 (4).

(t) Sect. 3 (5).

(u) 37 & 38 Vict. c. 78, sect. 1. See *ante*, p. * 875.

(x) Any question arising between vendor and purchaser as to any requisitions or objections may be dealt with summarily in chambers; see sect. 9. See *In re Ford & Hill*, 10 Ch. D. 365.

(y) *Cooper v. Emery*, 1 Phil. 388.

(z) *Ogilvie v. Foljambe*, 3 Mer. 65; *Best v. Hamand*, 12 Ch. D. 1.

time fixed by law or contract for the commencement of the title, notwithstanding reference to such being made in deeds, &c., produced, and he is to assume recitals and executions to be correct. (a)

Title to Leaseholds.—By the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), sect. 2, it is enacted that in the completion of any contract made after the 31st of December, 1874, and subject to any stipulation to the contrary in the [* 880] contract, under a contract * to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold. By the Conveyancing and Law of Property Act, 1881, which takes effect from and after the 31st of Dec. 1881, under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion. (b) And on a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion. (c) If an agreement is made for the sale of leasehold property (not being a church lease), the vendor is bound to establish the lessor's title to grant the lease, unless there is an express stipulation to the contrary in the contract; (d) and no agreement to dispense with the production of the lessor's title will be implied from the antiquity of the lease, (e) the shortness of the term for which the lease is granted, the small value of the property, or the absence of a premium. (f) But there is no such implied engagement in the case of a bargain for the purchase of an agreement for a lease. (g) If the vendor stipulates that he shall not be obliged to produce the lessor's title, this stipulation does not, of course,

(a) 44 & 45 Vict. c. 41, sect. 3 (3).

(b) 44 & 45 Vict. c. 41, sect. 3 (1).

(c) 44 & 45 Vict. c. 41, sect. 13. The section only applies where there is no contract to the contrary, and only to contracts made after 31st Dec., 1881.

(d) *Hume v. Bentley*, 5 De G. & S. 525.

(e) *Frend v. Buckley*, L. R. 5 Q. B. 213; 39 L. J. Q. B. 90.

(f) *Souter v. Drake*, 5 B. & Ad. 992; 3 N. & M. 40; *Hall v. Betty*, 5 Sc. N. R. 508; 4 M. & Gr. 410; *Purvis v. Rayer*, 9 Pr. 488; *Deverell v. Lord Bolton*, 18 Ves. 505.

(g) *Kintrea v. Preston*, 1 H. & N. 357; 25 L. J. Ex. 287.

preclude the purchaser from taking any objection derived from another source to the validity of that title. (*h*) But if the purchaser agrees to take the title that the vendor has, and to purchase the lease as holden by him, he will be precluded from objecting to the title. (*i*) The obligation to produce the lessor's title does not, it seems, extend to church leases and bishops' leases. (*k*) Upon the sale of a leasehold for lives, expressed to have been granted by a corporation in consideration of the surrender of a prior lease, the title to the surrendered lease must be shown. (*l*) When a man professes to grant or sell a lease, it is, of course, understood to be a lease which the lessee or purchaser may insist upon as good against all the world. If, therefore, a covenant or condition has been broken, and a right to re-enter has accrued to the superior landlord, and the vendor is unable to put the purchaser into possession of a good lease, he is responsible in * damages for a breach of contract. (*m*) [* 881] If the consent of the original lessor is essential to the validity of the transfer or assignment of the lease to the purchaser, it is, of course, the duty of the vendor to procure that consent. (*n*) When leaseholds consisting of several houses held under the same lease, are sold in several lots to distinct purchasers, and the lease contains covenants affecting the whole, with a proviso enabling the landlord to re-enter in case of the breach of any one covenant, the purchaser of one lot may be evicted without any default on his own part, but solely through the default of another purchaser. (*o*) Very great inconveniences may arise and great risk be run of the loss of the entire purchase from such a state of circumstances; the covenants of the original lease, therefore, should be strictly examined. When such covenants exist, the purchaser is not bound to accept the title with an indemnity. (*p*) By the Land Transfer Act,

(*h*) *Shepherd v. Keatley*, 1 C. M. & R. 117; *Waddell v. Wolfe*, L. R. 9 Q. B. 515; *Smith v. Robinson*, 13 Ch. D. 148. (*m*) *Penniall v. Harborne*, 11 Q. B. 368; 17 L. J. Q. B. 94; *Nouaille v. Flight*, 7 Beav. 521.

(*i*) *Spratt v. Jeffery*, 10 B. & C. 249; (*n*) *Lloyd v. Crispe*, 5 Taunt. 249; *Best v. Hamand*, *supra*. *Mason v. Corder*, 7 ib. 9; 2 Marsh. 332.

(*k*) *Fane v. Spencer*, 2 Mad. 438.

(*o*) *Paterson v. Long*, 6 Beav. 597.

(*l*) *Hodgkinson v. Cooper*, 9 Beav. 304; 15 L. J. Ch. 160.

(*p*) *Blake v. Phian*, 3 C. B. 976.

1875, (g) provisions are made for the registration of titles to leaseholds.

Waiver of Proof of Title and of Objections to Title. — Where a person contracted for the purchase of a lease of a public-house, and of the stock and good-will, and entered into possession, paid part of the purchase-money, and mortgaged his interest, it was held that he had waived his right to call for the production of the lessor's title. (r) The mere taking possession of lands and tenements under an agreement for the purchase of them, before any abstract has been delivered or proof of title produced, does not, of course, amount to a waiver of the purchaser's right to have an abstract delivered and title proved in the usual and ordinary course; (s) nor does the taking possession by the purchaser, after the delivery of an abstract, amount to an acceptance of the title, where the vendor has no title at all to the estate and interest bargained for and agreed to be conveyed. But if possession is given under the contract, and the abstract of title is delivered, and the purchaser continues in possession for a lengthened period, making no objections at all to the title, or only frivolous objections with a view of delaying payment of the purchase-money, the court will decree payment without going into any investigation of title, unless the title is clearly shown to be bad. (t) The taking of possession is not of itself a waiver, but is some evidence of acceptance of title which may be [* 882] rebutted by other * circumstances. (u) Proof of title to transfer the estate agreed to be sold is a condition precedent to the vendor's right to the purchase-money; and the court cannot, of course, make a purchaser accept a title which does not exist, and will not compel him to pay the purchase-money when it cannot give him the estate for which he agreed to pay it. (x) A purchaser cannot be held to have waived objections to title because his counsel has approved of the title. (y)

(g) 38 & 39 Vict. c. 87, sect. 11.

(r) *Haydon v. Bell*, 1 Beav. 337.

(s) *Burroughs v. Oakley*, 3 Swanst. 171.

(t) *Margravine of Anspach v. Noel*, 1 Mad. 310; *Hall v. Laver*, 3 You. & C. 196.

(u) *Hyde v. Warden*, 3 Ex. D. 72,

C. A.

(x) *Blachford v. Kirkpatrick*, 6 Beav. 236.

(y) *Deverell v. Lord Bolton*, 18 Ves. 505.

And even if he expressly accepts the title as satisfactory, such acceptance does not preclude him from subsequently showing that the vendor has no title at all, and that the acceptance had been made under a misapprehension and a mistake. (z) If it is stipulated by the contract that objections to title are to be considered as waived unless made within a certain time, the time is made of the essence of the contract; so that if the objection is not sent in within the time, the vendor has the right to take the benefit of the condition, and say that the title has been accepted, unless the abstract is so defective that no title is shown upon the face of it. (a) If the purchaser takes possession under the contract, and afterward rejects the title, he may be turned out of possession by the vendor, and cannot, in general, claim compensation for improvements. (b) Lastly, it may be observed that, whenever a third person having any right or title to lands or tenements about to be sold, knows of the sale and of his own title, and neglects to give the purchaser notice thereof, "he shall never afterward be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser; and in such case, infancy and coverture shall be no excuse." (c) A purchaser may, by taking possession of the estate agreed to be sold to him after the delivery of an abstract apprising him of the existence of certain incumbrances, waive his right of objecting to the title, on the ground of the existence of such incumbrances. Where, for example, a purchaser took possession of an estate after the delivery of an abstract of title, on the face of which it appeared that part of the estate was subject to a right of sporting, it was held that he had waived his right to object to the title on the ground of the existence of such a right. (d)

Of the Production of the Title-Deeds.—After the title, as * disclosed upon the abstract, has been approved [* 883] of and accepted by the purchaser or his legal advisers,

(z) *Warren v. Richardson*, 1 You. 1; (b) *Nicolson v. Wordsworth*, 2 Ward v. Trathen, 14 Sim. 82; *Bousfield v. Hodges*, 33 Beav. 90. Swanst. 365.

(c) *Savage v. Foster*, 9 Mod. 38;

(a) *Blacklow v. Laws*, 2 Hare, 40; *Sharpe v. Foy*, L. R. 4 Ch. 35.

Oakden v. Pike, 34 L. J. Ch. 620.

(d) *Burnell v. Browne*, 1 Jac. & Walk. 168.

the title-deeds themselves must be produced for inspection and examination and verification with the abstract. If they are not produced, the purchaser will not be bound to complete his purchase. In the case of a sale of a copyhold estate, the copies of court-roll are the documents of title, and must be furnished to the purchaser for comparison with the abstract; (e) and see now as to copyholds, *ante*, p. * 878. The vendor is in all cases bound to produce and show to the purchaser all deeds and writings in his possession or under his control that in anywise relate to or concern the property agreed to be sold, whatever be their date or age; but he is not in general bound, as we shall presently see, to furnish an abstract of any deed of an earlier date than sixty years. If the deeds abstracted refer to prior deeds, settlements, or wills not in the possession or under the control of the vendor, and the absence of the deed so referred to throws a serious doubt upon the title, the purchaser will not be bound to complete his purchase. "When the title under the conveyance which contains the recital is fortified by sixty years' undisputed possession, the loss of the deed recited throws no reasonable doubt upon the title." (f) If a deed or will in the abstract professes to have been made in execution of a power of appointment contained in a previous deed or will more than sixty years old, and not abstracted, the purchaser will be entitled to call for the production of the deed, if it is in the possession of the vendor, to see that the power has been properly executed (but see now, *infra*). But if there has been sixty years' undisputed possession by the parties entitled under the appointment, and the deed creating the power is not in the possession or under the control of the vendor, the presumption is in favor of a valid execution of the power, and the purchaser will be compelled to complete his contract, unless he can bring forward evidence impeaching the validity of the appointment, and throwing a reasonable doubt upon the title. By the Conveyancing and Law of Property Act, 1881, which takes effect from and after the 31st of December, 1881, a purchaser is not to require the production or

(e) *Whitbread v. Jordan*, 1 You. & 60; *Moulton v. Edmonds*, 29 L. J. Ch. C. 318.

(f) *Prosser v. Watts*, Mad. & Geld.

any abstract or copy of any document, nor make inquiry as to such, dated before the time fixed by law or contract for the commencement of the title, notwithstanding reference to such being made in deeds, &c., produced, and he is to assume recitals and executions to be correct. (g) The expenses of production, inspection, &c., of * documents not in the vendor's [* 884] possession are to be borne by the purchaser. (h)

Loss of Title-Deeds after Delivery of the Abstract. — If the title-deeds are destroyed by accident after approval of the title, the vendor must furnish the purchaser with the means of proving the actual existence of the deeds, their contents, and that they were duly delivered and executed by all necessary parties. If the abstract of title has been delivered and compared with the deeds themselves prior to their destruction, this may afford the means of proving the contents of the deeds; but it must then be shown who the attesting witnesses were, and that the deeds were duly executed and delivered, and the purchaser must be furnished with the means of proof thereof, for the purpose of asserting his title and defending his possession. If no such proof is afforded, the purchaser is discharged. (i) If after the making of the contract the purchaser is let into possession, and the contract is abandoned or rescinded and comes to nothing, the purchaser cannot be treated as a lessee, and cannot be compelled to pay rent, or to pay for the use, occupation, and enjoyment of the property. (*Post*, ch. 2, sect. 1.)

Effect of Misdescriptions. — The vendor must be prepared and able to convey and transfer to the purchaser an estate or interest substantially corresponding with that bargained for and agreed to be sold, both as regards the tenure and the situation and condition and natural advantages of the property. Any misdescription of the estate or interest, or of the nature, or situation, or extent, or value of the property in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the contract

(g) 44 & 45 Vict. c. 41, sect. 3 (3). *stenholme & Turner's Conveyancing Act*, p. 14, n. (a).
But this will not protect a vendor where a defect appears in the title. See *Wol-* (h) Sect. 3 (6).

(i) *Bryant v. Busk*, 4 Russ. 4.

would never have been made, at once releases the purchaser from the bargain. (*k*) If the conditions and particulars of sale provide that errors and misstatements shall not vitiate the sale, but that an abatement shall be made in the purchase-money by way of compensation, the provision will extend only to unintentional errors and misstatements in matters of detail not amounting to fraud, (*l*) and not materially altering the nature of the subject-matter of the contract itself; for no man is bound to

take an estate or interest essentially different from that [* 885] which he agreed to purchase. (*m*) * Where there are such conditions, and an error is discovered after the conveyance has been executed, the purchaser is entitled to compensation. (*n*) If an infinitesimal portion of the estate sold cannot be given to the purchaser, he may be compelled to complete with compensation; but not when the estate given is substantially different. (*o*)

A general agreement to sell a house or land means, as we have already seen, that the owner of the property will sell an estate in fee. The purchaser, therefore, may refuse to complete the purchase if the vendor is unable to transfer a freehold property; but if he chooses to take such an estate as the vendor has in the land, the latter will be bound to transfer his whole interest to the purchaser. (*p*) And if an abstract of title has been delivered to the purchaser, showing that the vendor has a different estate and interest from that bargained for and agreed to be sold, and the purchaser returns the abstract and accepts the title in writing, the purchaser will be deemed, as we have already seen (*ante*, p. * 878), to have assented to take the estate and interest disclosed upon the face of the abstract. So where there was a contract to sell the residue of a lease of which twelve and a half years were unexpired, but it turned out that the lessors

(*k*) *Dimmock v. Hallett*, L. R. 2 Ch. 377; 1 Sc. 190; *Hart v. Swaine*, 7 Ch. 21; 36 L. J. Ch. 146; *Aberaman Iron Works v. Wickens*, L. R. 4 Ch. 101. D. 42.

(*l*) *Dimmock v. Hallett*, L. R. 2 Ch. 21; 36 L. J. Ch. 146; *Whittemore v. Whittemore*, L. R. 8 Eq. 603; 38 L. J. Ch. 17. (*n*) *In re Turner & Skelton*, 13 Ch. D. 130, *per* Jessell, M. R.; *Manson v. Thacker*; 7 Ch. D. 620, not followed; but see *contra*, *Allen v. Richardson*, 13 Ch. D. 524, *per* Malins, V. C.

(*m*) *Flight v. Booth*, 1 Bing. N. C.

(*o*) *In re Arnold*, 14 Ch. D. 270.

(*p*) *Bower v. Cooper*, 2 Hare, 408.

had an option to determine at the end of five years, it was held that the purchaser might rescind the contract and recover the deposit; (q) and it was held, where a ground rent was omitted to be mentioned, that the purchaser of the lease was discharged. (r)

If, pending a negotiation for the sale of real property, the vendor affirms the rents to be more than they really are, and the person to whom the affirmation is made relies upon it and purchases the property, the vendor is liable to an action for deceit, whether he knew or did not know of the falseness of the affirmation at the time it was made, and although a conveyance is subsequently executed which contains no notice of any such affirmation. A representation of this sort has been held to amount to a warranty of the fact, on the ground that the vendor had better means of knowledge than the purchaser, who relied upon the truth of the statement and was deceived by it; "for," says Gould, J., "the value of the rents was a thing hard to be known, and secret, known to none but the landlord and his tenants, and they might be in confederacy together." "If," observes Holt, C. J., "the vendor gives in a * particular [* 886] of the rents, and the vendee says he will trust him and inquire no farther, but rely upon his particular, there, if the particular be false, an action will lie; but if the vendee will go and inquire farther what the rents are, there it seems unreasonable he should have an action, though the particular be false, because he did not rely upon the particular." (s) And even if the rent stated is literally true, but the fact is that the property had been only let for one year at the rent stated, which was far above its value, so that the statement is calculated to mislead, the vendee is entitled to be relieved from his purchase. (t) On the other hand, a statement which is not literally true, but which does not substantially mislead, is not ground for annulling a contract; as where a vendor of a leasehold house stated

(q) *Weston v. Savage*, 10 Ch. D. 1120; see *Bos v. Helsham*, L. R. 2 Exch. 736.

(r) *Jones v. Rimmer*, 14 Ch. D. 588. (t) *Dimmock v. Hallett*, L. R. 2 Ch. App. 21.

(s) *Lysney v. Selby*, 2 Ld. Raym.

himself as a lessee for twenty-four years, whereas he was an under-lessee for that period, less three days. (*u*)

Where the vendor of a public-house made, pending the treaty for the sale of the house, sundry false representations to the plaintiff concerning the amount of business done in the house, and the rent received for part of the premises, whereby the plaintiff was induced to give a larger sum than he would otherwise have given for the property, it was held that the plaintiff was entitled to maintain an action against the defendant for the deceit. (*x*)

If an estate is subject to a right of sporting, or a right of common, or a right to dig for mines, or a right on the part of third persons to have extensive underground watercourses, and to enter upon the land to open, cleanse, and repair such watercourses, and the purchaser contracts for the estate in ignorance of these rights, he may refuse to complete his purchase as soon as he is aware of their existence; and he cannot be compelled to take the estate with an abatement on the amount of the purchase-money. (*y*) If a man contracts for the purchase of a house *and* wharf, or a wharf *and* jetty, he may refuse to take the house without the wharf, or the wharf without the house, or without the jetty, if they are contiguous to each other, and were clearly intended to go together. (*z*) And whenever mansion-houses, farms, woods, or meadows are sold together as one estate, and the hope of possessing the one was the inducement to the purchaser to buy the others, he may insist upon having [* 887] the whole or none. (*a*) "The * court will determine as a jury would the question, 'Did or did not the party purchase the one with reference to the other? Would he or would he not have taken the one had he not reckoned also upon having the other?'" (*b*) If a purchaser has contracted for the

(*u*) Duddell v. Simpson, L. R. 2 Ch. App. 102; see Aberaman Iron Works v. Wickens, L. R. 4 Ch. App. 101.

(*x*) Dobell v. Stevens, 3 B. & C. 623; Canham v. Barry, 15 C. B. 597.

(*y*) Shackleton v. Sutcliffe, 12 Jur. 199.

(*z*) Peers v. Lambert, 7 Beav. 546.

(*a*) Poole v. Shergold, 2 Bro. C. C. 118; Gibson v. Spurrier, 2 Peake, 49; Dykes v. Blake, 4 Bing. N. C. 477; 6 Sc. 320; Chambers v. Griffiths, 1 Esp. 151.

(*b*) Casamajor v. Strode, 2 Myl. & Kee. 730; Lewin v. Guest, 1 Russ. 330.

purchase of a freehold interest, he is not bound to accept a copyhold estate, (c) nor a leasehold interest, however long the duration of the term. (d) If he has bargained for a fee-simple in possession, he is not bound to take a remainder in fee expectant upon the determination of a life estate, however advanced in life the tenant for life may be, or however liberal may be the compensation offered in the shape of an abatement of the purchase-money. (e) If he has bargained for the purchase of a lease having eight years to run, he cannot be compelled to take a lease of only six, although the vendor may offer him a proportionate reduction in the amount of the purchase-money. (f) But if there is only a slight difference in the duration of the term, as between the lease offered to be assigned and that bargained for, — if it substantially corresponds with the description given of it in the contract for the sale, — the purchaser will be bound to take it, and the deficiency must be compensated for in an abatement of the price. (g) If, therefore, the purchaser bargains for a term of ninety-nine years in land, and the vendor has only ninety-eight or ninety-seven years, the purchaser will be bound to take the smaller term, receiving a proportionate abatement in the amount of the purchase-money. (h) If he has bargained for a lease of the whole property, and finds that the vendor can only give a title to a moiety, he may have a decree for that moiety, and an abatement of the rent. (i)

If a man has not the entirety of the estate he professes to sell, the purchaser is not bound to accept at a proportionate price the share which he actually has in the estate. And if tenants in common of an estate contract for the sale of it, and one of them dies, the purchaser cannot be compelled to take the share of the survivors without the share of the deceased. (k) If the purchaser elects to take such an interest as the vendor has

(c) *Hick v. Phillips*, Pr. Ch. 575. (g) *Belworth v. Hassell*, 4 Campb.
 (d) *Drewe v. Corp.*, 9 Ves. 368; 140.
Wright v. Howard, 1 Sim. & Stu. 190; (h) *Halsey v. Grant*, 13 Ves. 77;
Price v. Ley, 4 Giff. 235. *Mortlock v. Buller*, 10 Ves. 305.
 (e) *Collier v. Jenkins*, 1 You. 295. (i) *Burrow v. Scammell*, 19 Ch. D.
 (f) *Farrer v. Nightingal*, 2 Esp. 175.
 639; *Long v. Fletcher*, 2 Eq. Ca. Abr. (k) *Att.-Gen. v. Day*, 1 Ves. Sen. 218.
 5, pl. 4.

in the land agreed to be sold, subject to a fair and proportionate abatement in the amount of the purchase-money, the vendor is not entitled to object to his so doing. The purchaser is [*888] entitled to take what * he can get with compensation for what he ought to have had, but cannot obtain, (*l*) provided the contract is capable of being carried out by a decree for specific performance. (*m*) Where, however, the purchaser knows that the land is in the occupation of a tenant, he is not entitled to specific performance with compensation if the tenant has a lease. (*n*) But neither, on the other hand, can the vendor enforce the contract if the terms of tenancy are materially misdescribed in the particulars of sale. (*o*) Quit-rents, being incidents of tenure, are proper subjects of compensation by abatement of the purchase-money. An omission, therefore, of the fact of an estate being charged with a quit-rent will not invalidate the contract for the sale of it; but it is otherwise if the charge is a rent-charge. (*p*) Conditions of sale must not be misleading, and a condition is misleading if it requires the purchaser to assume what the vendor knows to be false, or if it states that the title is not accurately known, when in fact it is accurately known to the vendor. (*q*)

The following misstatements and misdescriptions have been held so far material and important as to entitle the purchaser to refuse to complete his contract, and to enable him to recover back his deposit, on the ground that the vendor had not tendered him that which he bargained for and intended to buy, although the contract contained the usual provision that errors and misstatements should not vitiate the sale, — *i.e.*, a public-house described in the printed conditions as a “free public-house,” whereas it was held upon the terms that all the beer should be taken from a particular brewer; (*r*) a lease described

(*l*) *Wood v. Griffith*, 1 Wils. Ch. C. 45; *Thomas v. Dering*, 1 Kee. 744; *Nelthorpe v. Holgate*, 1 Coll. 203; *Graham v. Oliver*, 3 Beav. 124; *Barnes v. Wood*, L. R. 8 Eq. 424; 38 L. J. Ch. 683.

(*m*) *Price v. Griffith*, 1 De G. Mac. & G. 80; 21 L. J. Ch. 78.

(*n*) *James v. Lichfield*, L. R. 9 Eq. 51; 39 L. J. Ch. 248.

(*o*) *Caballero v. Henty*, L. R. 9 Ch. 447.

(*p*) *Esdaile v. Stephenson*, 1 S. & S. 122; *Bowles v. Waller*, 1 Hayes, 441.

(*q*) *In re Bannister*, 12 Ch. D. 131.

(*r*) *Jones v. Edney*, 3 Campb. 285.

as containing a restriction against offensive trades, whereas it contained a restriction not only against offensive trades, but also against some trades that were perfectly inoffensive; (s) houses described as Nos. 3 and 4, whereas they were Nos. 2 and 3; (t) a reversionary estate described as "absolute on the death of a person aged sixty-six," whereas the party was only sixty-four, and the reversion was not absolute; (u) a public-house and yard described as being holden for a term, of which twenty-three years were unexpired, at a rent of £55 per annum, whereas the yard was held distinct from the public-house, under a demise from year to year only, at an * additional rent of [* 889] £8 per annum; (x) a redeemable estate or a redeemable annuity issuing out of land, described generally as "an estate" or "an annuity," no notice being taken of its being subject to redemption; (y) a plot of ground described generally on a plan, without notice of any right of way over it, or right of sporting, whereas it was held subject to a right of sporting, (z) or to a right of way on the part of the occupiers of an adjoining house, their servants and families; (a) leases described as containing particular covenants on the part of the lessees, whereas no such covenants existed; (b) or described as leasehold renewable by custom, when no custom to renew existed; (c) dwelling-houses described as being holden on a ground-rent lease at a net annual ground-rent of £42, whereas the rent was a rack-rent; (d) a dwelling-house described as a brick-built dwelling-house, whereas parts of the external walls were composed of only lath and plaster; (e) a steam factory described as being well supplied with "water," whereas there was no natural supply, but all the water was furnished at very great cost by a water company; (f) a

(s) *Flight v. Booth*, 1 Sc. 203; 1 Bing. N. C. 377. 463; 6 Sc. 320. If the right of way is patent and obvious, the principle of *caveat emptor* applies; *Bowles v. Round*, 5 Ves. 509.

(t) *Leach v. Mullett*, 3 C. & P. 115.

(u) *Sherwood v. Robins*, 3 C. & P. 339; *Mood. & M.* 194.

(x) *Dobel v. Hutchinson*, 3 Ad. & E. 356.

(y) *Coverley v. Burrell*, 5 B. & Ald. 257; *Ballard v. Way*, 1 M. & W. 520.

(z) *Burnell v. Brown*, 1 Jac. & W. 168.

(a) *Dykes v. Blake*, 4 Bing. N. C.

(b) *Waring v. Hoggart*, R. & M. 39.

(c) *Newby v. Painter*, 17 Jur. 483.

(d) *Stewart v. Alliston*, 1 Mer. 26.

(e) *Robinson v. Musgrove*, 2 Mood. & R. 92.

(f) *Leyland v. Illingworth*, 3 De G. F. & J. 248; 29 L. J. Ch. 611.

house described as being held at a low ground-rent of £15 per annum, whereas the ground-rent was £35 per annum; (*g*) a lease described as an original lease, whereas it was an under-lease, (*h*) and described as in the occupation of a tenant, whereas the occupier was a hostile claimant; (*i*) meadows described generally, without notice of any right of common over them, whereas one of the meadows was held subject to the exercise of such a right every third year; (*k*) a timber estate described as comprising a wood of sixty-five acres of fine oak timber trees of the average size of fifty feet, whereas the average size of the trees appeared to be only twenty-two feet; (*l*) a sum in gross payable under a covenant described as a freehold ground-rent. (*m*) Where a purchaser surveyed the property with a plan in his hand, which had been furnished to him by the vendors, and was naturally misled into thinking that the boundary included certain trees which it did not include, the court held that he had [* 890] been misled by the fault of the * vendors, and refused to decree specific performance against him. (*n*)

But if the thing tendered to the purchaser substantially corresponds with the description given in the contract of sale, and there only exists some trifling defect, easily measurable by a pecuniary standard, the purchaser will be bound to complete his contract, on receiving a proportionate abatement of the purchase-money. Thus where a piece of meadow-land, imperfectly watered, was described by a vendor as "uncommonly rich water-meadow," and where a leasehold estate was represented to be nearly equal to freehold, being renewable upon a small fine, whereas the fine was a large one, it was held that the misrepresentation did not avoid the contract, but afforded ground for compensation to the purchaser. (*o*) And if the purchaser must have known the true state and condition of the property,

(*g*) *Mills v. Oddy*, 6 C. & P. 728.

(*h*) *Mason v. Corder*, 2 Marsh. 336.

(*i*) *Lachlan v. Reynolds*, 23 L. J. Ch. 8.

(*k*) *Gibson v. Spurrier*, Peake's Ad. Cas. 49.

(*l*) *Lord Brooke v. Rounthwaite*, 5 Hare, 298; 15 L. J. Ch. 332.

(*m*) *Robins v. Evans*, 2 H. & C. 410;

33 L. J. Ex. 68.

(*n*) *Denny v. Hancock*, L. R. 6 Ch. 1; 40 L. J. Ch. 193.

(*o*) *Scott v. Hanson*, 1 Sim. 13; *Fenton v. Browne*, 14 Ves. 144; *Trower v. Newcombe*, 3 Mer. 704.

and could not have been misled or deceived by the misdescription, he will not be permitted to avail himself of it for the purpose of defeating the contract. So, too, if he proceeds with the treaty after he is aware of the misstatement or misdescription, and makes no objection, he will be deemed to have waived his right to object, and to have assented to take the estate as it is, and not as it was described to be, subject in certain cases to an abatement in the amount of the purchase-money. If the misrepresentation, moreover, does not in anywise affect the value or enjoyment of the property, it will not invalidate the contract. Thus where fines payable to the lord of a manor were described as arbitrary, whereas they were both arbitrary and certain, but the annual value of the property was correctly stated, it was held that the purchaser had no ground for refusing to complete the purchase. (*p*) If the price of an estate is not regulated by the acreage of the property, but by its peculiar situation or adventitious value, and the quantity is stated as mere matter of description or opinion, and not as the result of actual admeasurement, the purchaser may be compelled to take the estate, and will not be entitled to any abatement of his purchase-money, if the actual quantity falls short of the estimated quantity. If the price has been regulated by the acreage, and the quantity has been innocently misrepresented by the vendor, "the purchaser has a right to have what the vendor can give, with an abatement out of the purchase-money for so much as the quantity falls short of the representation. This is the rule, though the land is neither bought nor sold professedly by the acre, the presumption being that, in fixing the price, regard was had on both sides to the * quantity which [* 891] both supposed the estate to consist of." (*q*) But where a mistake of quantity is of such a nature that it cannot fairly and equitably be made the subject of compensation, it is not a case for compensation, but a ground for avoiding the contract. (*r*) If the purchaser has never seen the estate, but relies solely on

(*p*) *White v. Cuddon*, 8 Cl. & Fin. 785. (*r*) *Durham (Earl of) v. Legard*, 34 L. J. Ch. 589.

(*q*) *Hill v. Buckley*, 17 Ves. 401;
King v. Wilson, 6 Beav. 129.

the representations made to him by the vendor, and there is any great or material difference between the actual and represented quantity, the purchaser will not be bound to complete his purchase. The words "more or less," or "thereabouts," will only cover a moderate excess or deficiency, and will never be suffered to be the instrument of fraud. (s) If the vendor makes a mistake against his own interest, as if he sells an estate with the timber, and the timber is by mistake sold at too low a price, he cannot have the sale re-opened, and the purchaser is entitled to his bargain. (t) Where an auctioneer innocently represented there was a right of way to a property when there was none, it was held by Denman, J., that no action to recover compensation could be had against the vendor after completion of the purchase. (u)

Alterations in the Condition of the Property.—The vendor must be prepared also to transfer the estate in the same state and condition that it was in at the time of the making of the agreement for the sale; otherwise the purchaser may repudiate the contract and recover his deposit. Thus where the vendor pulled down and removed a summer-house, it was held that the purchaser might refuse to complete the purchase and recover back the deposit. (x) So where, after an agreement had been entered into for the purchase and sale of an estate, and before the completion of the contract by the execution of the deed of conveyance, the vendor cut down some ornamental timber, it was held that the purchaser might refuse to complete his contract. (y) If a man contracts for the sale of the land and trees, the purchaser is not bound to take the estate without the timber. (z) If it is stipulated that the purchaser shall pay for timber growing on the land, he must pay for all trees which are considered to be timber by the custom of the country. (a)

(s) *Day v. Fynn*, Owen, 133; *Winch v. Winchester*, 1 Ves. & B. 377; *Portman v. Mill*, 2 Russ. 570.

(t) *Griffiths v. Jones*, L. R. 15 Eq. 279; 42 L. J. Ch. 468.

(u) *Brett v. Clowser*, 5 C. P. D. 376.

(x) *Granger v. Worms*, 4 Campb. 83.

(y) *Magennis v. Fallon*, 2 Moll. 588.

(z) *Duke of St. Albans v. Shore*, 1 H. Bl. 280.

(a) *Duke of Chandos v. Talbot*, 2 P. Wms. 601; *Aubrey v. Fisher*, 10 East, 446.

Time and Mode of Performance.¹—By the Judicature Act, 1873, sect. 25 (7), stipulations in contracts as to time or otherwise, which would not before the passing of this act have been deemed *to be or to have become of the essence [* 892] of such contract in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity. The time appointed for the conveyance of the legal estate, or the delivery of the abstract of title, or the performance of the other preliminaries, is not of the essence of the contract; and the parties, although precise days are fixed, will be allowed a reasonable time for performance, regard being had to all the circumstances of the case, and the nature of the

¹ Time, when the essence of a contract, see U. S. Dig. tit. *Contracts*, sect. 924; ib. tit. *Specific Performance*, sects. 629–664; ib. tit. *Vendor and Purchaser*, sect. 945; article by C. C. Cole, 15 West. Jur. 97; *Furlong v. Barnes*, 8 R. I. 226; *Sharp v. Johnston*, 3 Lans. 520, 40 How. Pr. 400; *Leaird v. Smith*, 44 N. Y. 618; *Miller v. Miller*, 25 N. J. Eq. 354; *Moots v. Scriven*, 33 Mich. 500; also 2 Pars. Contr. 659, 660; 3 ib. 382; 2 Minor, Inst. 804; 2 Story, Contr. (5th ed.) sect. 1324.

That time is of the essence of the contract is not presumed; if such is the intention it should clearly appear. *Dillon v. Masterton*, 39 N. Y. Superior Ct. 133.

In general, time is not considered by courts of equity to be of the essence of the contract for the sale of lands; but when the terms of the contract or the nature and circumstances of the transaction clearly show that the parties intended to secure a right to an exact performance in respect to time, equity will enforce the right. *King v. Ruckman*, 20 N. J. Eq. 316, ib. 599; *Bullock v. Adams*, 20 ib. 367; *Grigg v. Landis*, 21 N. J. Eq. 494; s. p. *Prince v. Griffin*, 27 Iowa, 514; *Gill v. Bradley*, 21 Minn. 15.

If upon the face of a contract and from the surrounding circumstances it clearly appears to have been the distinct understanding and agreement of the parties that if the stipulated act was not performed within the specified time, certain consequences were to follow, and if default be made in the performance within the time, a court of equity will give no relief unless a strict performance was either waived by the party or is excused on some special ground of equitable cognizance. *Steele v. Branch*, 40 Cal. 3.

Time is not of the essence of a contract to convey land at a future day, unless the language of the contract clearly indicates that it was so intended by the parties. *Knott v. Stephens*, 5 Oreg. 235.

Contracts with reference to the sale of lands must be performed or rescinded within a reasonable time, even though time is not of the essence of the contract; and if a party is chargeable with unreasonable delay on his part that cannot be explained consistently with good faith, equity will not enforce a specific performance. *Ditto v. Harding*, 73 Ill. 117; s. p. *Gill v. Bradley*, 21 Minn. 15.

An agreement to extend the time of payment "to the summer" of a given year will be construed to mean until the first day of the first summer month, June; and an agreement to extend the time "until the fall," means to the first day of September. Courts take judicial notice of the seasons, and of the general course of agriculture. *Abel v. Alexander*, 45 Ind. 523.

title to be made. (b) If the vendor will not complete his part of the contract within a reasonable time, the purchaser may withdraw from the contract, and decline to have anything further to do with it. (c)

Time may, however, be made of the essence of the contract, before the sale, by a proper condition, (d) and after the sale, by giving a proper notice of completion or rescission by a limited time, (e) if there has been no unreasonable delay; (f) and if it plainly appears to have been the intention of the parties that time should be of the essence of the contract, (g) or that the sale should be conditional, and be made to depend on the performance of the contract by an appointed period, the court will not decree performance after the time has elapsed. (h) Thus in a condition that objections to the vendor's title are to be sent in within a given period, time is of the essence of the contract. (i) But if a vendor does not deliver the abstract of title within the time specified, the purchaser is not bound to send in his objections within the specified time. (k) Time is considered to be material, and, to a very considerable extent, to be of the essence of the contract, from the nature of the property or the surrounding circumstances, (l) as where the subject-matter of the sale is exposed to daily variations in value, such as stock, shares, scrip, (m) reversionary estates, (n) mines, factories, and buildings used for trading purposes, (o) and public-houses, (p) and in the

(b) *Hipwell v. Knight*, 1 You. & Col. 416; *Hearne v. Tenant*, 13 Ves. 287. *Ranelagh (Lord) v. Melton*, 34 L. J. Ch. 227; 2 Dru. & Sm. 278.

(c) *Macbryde v. Weekes*, 22 Beav. 539; *Nott v. Riccard*, ib. 307. (i) *Oakden v. Pike*, 34 L. J. Ch. 620. (k) *Upperton v. Nicholson*, L. R. 6

(d) *Hudson v. Temple*, 29 Beav. 536; 30 L. J. Ch. 251. Ch. 436; 40 L. J. Ch. 401.

(e) *Taylor v. Brown*, 2 Beav. 180; *Wells v. Maxwell*, 32 Beav. 408; 33 L. J. Ch. 45. (l) *Roberts v. Berry*, 3 De G. M. & G. 284; *Tilley v. Thomas*, L. R. 3 Ch. 61.

(f) *Green v. Sevin*, 13 Ch. D. 589. (m) *Doloret v. Rothschild*, 1 Sim. & Sta. 590.

(g) *Darnley (Earl of) v. London & Chatham, &c. Ry. Co.*, 33 L. J. Ch. 9. (n) *Newman v. Rodgers*, 4 Bro. C. C. 391. Unless where a contrary intention can be gathered. *Patrick v. Milner*, 2 C. P. D. 342.

(h) *Reynolds v. Nelson*, Mad. & Geld. 26; *Hudson v. Bertram*, 3 Mad. 440; *Walker v. Jeffreys*, 1 Hare, 348.

Hipwell v. Knight, 1 Y. & C. 401; (p) *Cowles v. Gale*, L. R. 7 Ch. 12; 41 L. J. Ch. 14.

case of contracts made with ecclesiastical corporations, where the value * of the subject-matter of the contract, [* 893] and the persons who are to participate in the benefit of it, are liable to constant change. (q) If a person seeking to enforce a contract for the sale of land, has himself been guilty of delay, — if he has slept over his rights, and allowed an unreasonable time to elapse before seeking for performance, — the court will not assist him. (r) Where a purchaser agrees that, if “from any cause whatever” the purchase shall not be completed on the day fixed, he will pay interest, he must pay such interest, unless the delay has been occasioned by misconduct on the part of the vendor. (s)

Where time is of the essence of the contract, mutual promises or covenants between a vendor and purchaser for the conveyance of an estate on the one hand, and the payment of the purchase-money on the other, at an appointed period, constitute mutual conditions to be performed at the same time; so that “if one party was ready and willing, and offered to perform his part of the contract, and the other neglected or refused to perform his, he who was ready and willing has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act.” (t) It is a sufficient performance, however, of the vendor’s part of the contract if he is “ready and willing” to execute a conveyance, inasmuch as it is the duty of the purchaser to prepare the conveyance, and tender it to the vendor for execution, (u) unless the latter has previously declared that he will never execute it, or has refused to deliver the abstract, and intimated his intention not to complete the purchase, or has sold the estate to another person, or done any other act incapacitating himself from fulfilling his engagement. (x) The conveyance, when tendered, must

(q) *Carter v. Dean, &c. of Ely*, 7 Sim. 211. *Palmerston (Lord) v. Turner*, 33 Beav. 524; 33 L. J. Ch. 457.

(r) *Lloyd v. Collett*, cited 4 Ves. 690; *Guest v. Homfray*, 5 Ves. 818; *Watson v. Reid*, 1 Russ. & Myl. 236; *Colby v. Gadsden*, 34 Beav. 416. (t) *Jones v. Barclay*, Doug. 684; *Kingston v. Preston*, cited ib. 691.

(u) *Poole v. Hill*, 6 M. & W. 835. (x) *Franklyn v. Lamond*, 4 C. B. 637; 16 L. J. C. P. 221.

(s) *Williams v. Glenton*, 34 Beav. 528; L. R. 1 Ch. 200; 35 L. J. Ch. 284;

be a conveyance of the estate and interest bargained for and agreed to be sold, or the vendor will not be bound to execute it. (y) On a sale, the purchaser is not entitled to have the conveyance executed in his presence or his solicitor's, but at his own cost may have the signature attested. (z)

If one time has been appointed for the execution of the conveyance and another for the payment of the purchase-money, the mutual promises do not constitute mutual conditions, but

the several acts must be strictly performed in the order [* 894] of time agreed * upon. And if a time is appointed for

the payment of the purchase-money, but no time has been specified for the execution of the conveyance, the purchaser is bound to pay the money at the time appointed, whether he has or has not obtained a conveyance of the property. In such a case the execution of the conveyance is not a condition precedent to, or concurrent with, the payment of the purchase-money; and the vendor may consequently sue for the money, if it is not paid at the time appointed without offering or expressing his readiness to execute a conveyance. (a)

Enlargement of the Time of Performance.—The time limited for the performance of a contract required to be in writing by the statute of frauds cannot be extended by a mere oral agreement; "for to allow the substitution of a new stipulation as to the time of completing the contract, by reason of a subsequent oral agreement between the parties to that effect, in lieu of a stipulation as to time contained in the written agreement signed by the parties, is virtually and substantially to allow an action to be brought on an agreement relating to the sale of land, partly in writing signed by the parties, and partly not in writing but by parol only, and amounts to a contravention of the statute of frauds." (b) Where a contract for the sale and purchase of land provided that a good title to the land should be produced, and a defect was discovered in the title which could not be cured, and the purchaser then agreed by word of mouth to waive the

(y) *Vonhollen v. Knowles*, 12 M. & W. 602.

(z) 44 & 45 Vict. c. 41, sect. 8.

(a) *Mattock v. Kinglake*, 10 Ad. & E. 50.

(b) *Stowell v. Robinson*, 3 Bing. N. C. 937; 5 Sc. 212.

defect and take the land with such a title as the vendor himself possessed, but afterward, repenting his subsequent promise, he refused to complete the purchase, it was held that the oral waiver could not be given in evidence, that it had the effect of creating a new contract altogether different from the original contract, and ought to have been authenticated by writing. (c) But even where time is of the essence of the contract, it may be waived by the conduct and actions of the parties, and by the contract being treated and acted upon as a continuing contract after the appointed period. (d)

Non-Performance by the Vendor.—Where the vendor has reserved to himself a right to rescind the contract if the purchaser raises objections to the title which the vendor is unable or unwilling to remove, the vendor cannot refuse to complete the contract if the purchaser is willing to waive the objections he has made. (e) But if the purchaser, with knowledge of the inability * or unwillingness of the vendor to re- [* 895] move the objection, continues to insist upon it, and notice of rescission is then given, nothing done afterward on the part of the purchaser—no subsequent waiver of the objection—will restore the contract. (f) The word “unwilling” in a condition of sale of this description is not to be considered as giving an arbitrary power to the vendor to annul the contract. The vendor must show some reasonable ground for the unwillingness,—as, for instance, that if he proceeds to comply with a requisition, he will be involved in expenses far beyond what he ever contemplated, or be involved in litigation and expense which he never contemplated, and for avoiding which he reserved to himself the power of annulling the contract. (g) If the purchaser intends to sue for the recovery of a deposit paid by him under the contract, and for general damages, by reason of the non-performance of the contract by the vendor at the time agreed upon, the purchaser should give the vendor notice of his inten-

(c) *Goss v. Lord Nugent*, 2 N. & M. 35; *Harvey v. Graham*, 5 Ad. & El. 74. 102.

(d) *Webb v. Hughes*, L. R. 10 Eq. 281; 39 L. J. Ch. 606. (f) *Duddell v. Simpson*, L. R. 2 Ch. 107.

(e) *Turpin v. Chambers*, 29 Beav. 104; 16 Beav. 59; 30 L. J. Ch. 470.

tion, and allow the latter a reasonable time, from the date of the notice, to complete the contract. (*h*) If there has been a general breach of contract by the vendor, independently of the question as to the time of performance, or the title to relief has been barred by notice, an action is maintainable for the recovery of the deposit, with interest, when the deposit has been paid into the hands of the vendor himself. If the vendor has no title to the property agreed to be sold, or if he has a naked legal title, or an equitable interest only, the deposit is recoverable, (*i*) unless there is an express agreement to the contrary; (*k*) and so it is if the estate is shown to be subject to an equitable incumbrance. (*l*) The purchaser in these cases is entitled, as we shall presently see, to recover the costs and expenses incurred by him in investigating the title; (*m*) also the costs of preparing and tendering a conveyance where that has been done; and where the vendor has acted with bad faith, and wilfully refused to fulfil his contract, damages for the loss of his bargain. It will be no defence to the action that the vendor has a title at the time of the trial, or after the commencement of the action. (*n*) Where a purchaser paid a deposit on a contract for the purchase of a lease of a house, and afterward discovered that the house was comprised with another in an original lease, under which the lessor had a right to re-enter for breach of covenants [* 896] in respect of either house, it was held that *the purchaser might rescind the contract and sue for his deposit and expenses. (*o*)

In order to entitle himself to maintain an action against the vendor for the damages resulting from the non-execution of the conveyance, the purchaser must prove a tender of a conveyance to the vendor for execution, and his own readiness and willingness to pay the purchase-money, unless the vendor has incapa-

(*h*) *Parkin v. Thorold*, 16 Beav. 59; 22 L. J. Ch. 175; *King v. Wilson*, 6 Beav. 126. (*k*) *Ashworth v. Mounsey*, 23 L. J. Ex. 73.

(*i*) *Maberley v. Robins*, 5 Taunt. 625; 1 Marsh. 258; *Cane v. Baldwin*, 1 Stark. 65; *Roper v. Coombes*, 6 B. & C. 534. (*l*) *Elliot v. Edwards*, 3 B. & P. 181. (*m*) *Richardson v. Chasen*, 16 L. J. Q. B. 341. (*n*) *Cornish v. Rowley*, 1 Selw. N. P. 12th ed. 203.

(*o*) *Blake v. Phinn*, 3 C. B. 976.

citated himself from executing a conveyance by selling the estate to another, and has thus discharged the purchaser from his obligation. (*p*) But it is not necessary for the purchaser to prepare and tender a conveyance, in order to entitle himself to maintain an action for the recovery of his deposit, and the expenses of investigating the title. (*q*) If the vendor's failure to make out a good title arises from circumstances over which he has no control, and is not the result of fraud or *mala fides* on his part, the purchaser will not be entitled to recover damages in respect of the presumed or fancied value of his bargain; but if the vendor's conduct has been fraudulent, the case is otherwise. If the title has been made out and accepted by the purchaser, and the latter has then resold to a second purchaser, and the original vendor refuses to execute a conveyance on being tendered the purchase-money, the purchaser will be entitled, on tendering a conveyance, to recover the profit realized on the resale, and all the costs and expenses attending it, in addition to his costs of investigating the title. If the purchaser sues the vendor, upon the contract, for the recovery of his deposit as part of the damages resulting from the vendor's neglect to complete the sale, he will be entitled to recover interest upon his deposit; (*r*) and he may also, in certain cases, recover interest upon the purchase-money, if it has been lying idle, awaiting the vendor's acceptance. (*s*) But if it should turn out that the contract was not binding upon the vendor by reason of its not being properly authenticated by writing, or if the contract has been abandoned or rescinded by mutual consent, interest on the deposit cannot be recovered, nor any of the costs and expenses incurred in the investigation of the title. (*t*) It is frequently stipulated in contracts for the sale and purchase of estates that, if either party shall neglect to fulfil his part of the contract, he shall pay to the other a fixed, ascertained sum of money, as the liquidated and agreed damages. The amount so agreed to be * paid [* 897]

(*p*) *Knight v. Crockford*, 1 Esp. 193. *Lichfield*, 1 Sc. 443; 1 Bing. N. C. 492;

(*q*) *Lowndes v. Bray*, Sugd. Vend. 14th ed. 364. *Gardom v. Lee*, 34 L. J. Ex. 113.

(*r*) *Walker v. Constable*, 1 B. & P.

(*s*) *Weston v. Savage*, 10 Ch. D. 736. 306; *Gosbell v. Archer*, 2 Ad. & E. 500;

(*t*) *Farquhar v. Farley*, 7 Taunt. 4 N. & M. 485; *Casson v. Roberts*, 32 592; 1 *Moore*, 322; *Hodges v. Earl of* L. J. Ch. 105.

may, as we have already seen, under certain circumstances and with certain qualifications, be recovered by action. (*u*) And where the vendor is in default, the purchaser will generally be held to be entitled to a lien on the estate for his deposit and interest. (*x*)

Non-Performance by the Purchaser — Forfeiture of Deposit. —

In case of the non-performance of the contract by the purchaser, the deposit is forfeited; (*y*) but to entitle the vendor to retain the deposit, he must show that he has faithfully fulfilled his own part of the contract, and has not done anything amounting to a waiver of his right to take advantage of the forfeiture. If he has himself prevented the purchaser from fulfilling the contract at the time appointed, or has himself asked for delay, or has induced the purchaser to incur the forfeiture by fraudulent statements and deceitful promises, he will not be permitted to take advantage of such forfeiture. (*z*) Where it was stipulated by the contract that objections to the title not made within twenty-one days should be considered as waived, and the deposit forfeited, and the vendor at liberty to resell in case of the non-completion of the purchase by the purchaser, and the vendor's solicitor received the objections long after the twenty-one days, and entered into a written correspondence respecting them, it was held that the vendor had waived his right to insist on the forfeiture of the deposit and to resell the estate. (*a*) The personal representative of the purchaser, and not his heir, is the proper party to be made plaintiff in an action brought for the recovery of the deposit. (*b*) A purchaser who is entitled to a return of his deposit cannot be compelled to take the stock in which it may have been invested, unless the investment was made with his assent and direction, or under the authority of the court. His assent to the investment cannot be inferred from the fact of notice having been given him thereof, and no reply having been made to such notice. (*c*) A stipulation for the forfeiture of the

(*u*) *Post*, p. *1113.

(*x*) *Rose v. Watson*, 33 L. J. Ch. 385; 10 H. L. C. 672.

(*y*) *Ex parte Barrell*, L. R. 10 Ch. 512.

(*z*) *Carpenter v. Blandford*, 8 B. & C. 575; 3 M. & R. 95.

(*a*) *Cutts v. Thodey*, 13 Sim. 206.

(*b*) *Orme v. Broughton*, 4 Moo. & Sc. 417; 10 Bing. 533.

(*c*) *Roberts v. Massey*, 13 Ves. 561.

deposit, in case of the non-completion of the contract by the purchaser, does not preclude the vendor from suing the purchaser for the recovery of the general damages resulting from the breach of contract; but if the deposit has been paid to the vendor, and forfeited, it must be treated as so much money paid to the vendor on account of such damages, (*d*) unless it was clearly the intention of the parties *that the purchaser, if in [*898] default, should pay the damages as well as forfeit the deposit. (*e*)

Deposits in the Hands of Auctioneers and Third Parties. —

When a deposit has been paid into the hands of an auctioneer, solicitor, or any third party, the latter stands in the position of a stakeholder, and is responsible for the payment of the amount to the vendor in case of the completion of the contract, and also for the return of it to the purchaser in case of the abandonment of the contract, or the neglect of the vendor to complete his part of it. The depositary, therefore, should not part with the deposit until the sale has either been abandoned, or has come to nothing, or until it has been duly completed and carried into effect, and it appears by the result to whom the deposit properly belongs. (*f*) If he pays it over to the vendor, and the title turns out to be defective, he will be bound to make good the amount to the purchaser, (*g*) unless it appears to have been the intention of the parties that the amount should be paid over to the vendor, and it has accordingly been done; (*h*) as, for instance, where the deposit is to be paid to the vendor's solicitor "as agent for the vendor," in which case the solicitor is not a stakeholder, but must pay the deposit to the vendor on demand. (*i*) If the auctioneer makes away with the deposit and becomes bankrupt, the loss will in general fall upon the vendor, who selects and appoints him, and constitutes him his agent for the receipt and keeping of the money. (*k*) No notice need be given to the

(*d*) *Ockenden v. Henly*, El. Bl. & El. 485; 27 L. J. Q. B. 361. As to when the forfeit of the deposit can be treated as liquidated damages, see *Lea v. Whitaker*, L. R. 8 C. P. 70.

(*e*) *Essex v. Daniell*, L.R. 10 C.P.538.

(*f*) *Ante*, p. * 362.

(*g*) *Gray v. Gutteridge*, 1 M. & R. 614.

(*h*) *Hurley v. Baker*, 16 M. & W. 26.

(*i*) *Edgell v. Day*, L. R. 1 C. P. 80; 35 L. J. C. P. 7.

(*k*) *Annesley v. Muggerridge*, 1 Mad. 593; *Smith v. Jackson*, 1 Mad. 618.

auctioneer of the abandonment of the contract, or of the default made by the vendor, prior to the commencement of the action against him for the recovery of the deposit. (*l*) When the action for the return of the deposit is brought against the auctioneer, interest thereon is not recoverable by the purchaser, although the money has been placed in the funds, and interest has been made. (*m*) But it is otherwise, as we have already seen, when the deposit has been paid to the vendor, and the action for its recovery is brought against him (*ante*, p. * 896).

Rights of the Vendor.¹ — Before the vendor can maintain an action for the recovery of damages by reason of the neglect of the purchaser to tender and accept a conveyance of the estate and pay the purchase-money, he must produce and establish a good title to the estate agreed to be sold, and it must appear that he was ready and willing to execute a conveyance thereof to the purchaser, on receiving payment of the purchase-money. (*n*) But if he can prove this, he is entitled, as we shall presently see, to recover all the damages he has sustained by the breach of contract, and all the costs, charges, and expenses he has incurred. Before he brings an action to recover such damages by reason of the non-payment of the purchase-money at the time appointed, he should give notice to the purchaser, and require the latter to pay the money within a reasonable time. If the purchaser takes possession of the estate, and receives the rents and profits, he will in general be compelled to pay interest on the purchase-money from the time that he became possessed of the property. If he neglects to fulfil his part of the contract at the time appointed, or within a reasonable period after request if no time was appointed, the vendor will be entitled, after a reasonable notice, to resell the estate and sue for damages. If a second pur-

¹ *Schnebly v. Ragan*, 7 Gill & J. 120, 28 Am. Dec. 195, and note on Vendor's Lien, by A. C. Freeman, *ib.* 199; article on Assumption of incumbrances by the purchaser of land, 18 Am. L. Reg. n. s. 337, 401.

(*l*) *Duncan v. Cafe*, 2 M. & W. 244. (*n*) *Martin v. Smith*, 6 East, 555;
 (*m*) *Harrington v. Haggart*, 1 B. & Hallewell *v. Morrell*, 1 M. & Gr. 367;
Ad. 577; *Curling v. Shuttleworth*, 6 Poole *v. Hill*, 6 M. & W. 835; *Phillips*
Bing. 121; 3 Moo. & P. 368; *Gaber v. v. Fielding*, 2 H. Bl. 132.
Driver, 2 Y. & J. 549.

chaser has taken a conveyance and paid his purchase-money without notice of a prior sale, he has equal equity with the first purchaser; and having clothed himself with the legal estate, he comes within the rule that, where parties have equal equity, he who has the legal title shall prevail. But if such second purchaser had notice of the first contract, the court will, if the first purchaser's right to a specific performance has not been barred, compel such second purchaser to convey the estate to the first purchaser. To obviate difficulties and objections to a resale, it has been usual to insert in agreements for the sale of realty a stipulation to the effect that, if the purchaser shall fail to complete the purchase and pay the price at the time appointed, the agreement shall be utterly void, and the vendor be at liberty to resell the estate, and that the deficiency, if any, by such resale, together with the costs and charges attending the same, shall be made good by the defaulter. (o) This stipulation, and also a vendor's notice of resale, may be waived, and the right to take advantage of it lost, if objections to title made by the purchaser have been considered by the vendor or his attorney subsequently to the time fixed for the resale, and if it be shown, through the medium of written evidence, that the vendor, after such time of resale had elapsed, still continued to deal with the purchaser as a purchaser, and still continued to treat the contract as a subsisting contract. (p) When the vendor has resold and conveyed the property under * these circumstances, he will be considered as selling [* 900] it for the benefit of the original purchaser, for whom, by the first agreement, he became trustee, and he will be compelled to account to him for the purchase-money. (q)

Damages from Breach of Contract for the Sale of Realty—Non-Performance by the Purchaser.—If an estate agreed to be sold has been actually conveyed by the vendor to the purchaser, and has become the property of the latter, and the vendor sues for the non-payment of the purchase-money, the measure of damages is the price agreed to be paid, with interest; but if no

(o) *Ex parte Hunter*, 6 Ves. 94.

(p) *Cutts v. Thodey*, 13 Sim. 206; 1 Col. 223.

(q) *Daniels v. Davison*, 16 Ves. 255.

conveyance has been executed, and the estate still remains the property of the vendor, the measure of damages is the difference between the price agreed to be paid and the marketable value of the property; for the vendor cannot have both the estate and the purchase-money. (r) So long as the right of property in the thing agreed to be sold has not passed to the purchaser, the vendor is entitled (*ante*, p. * 899), in case of the non-completion of the contract by the purchaser, to resell it; and if the resale has taken place within a reasonable period from the breach of contract, the difference between the price realized on the resale and that agreed to be paid by the purchaser will be the measure of damages which the vendor will be entitled to recover in addition to the costs, charges, and expenses of the resale. If the vendor does not resell the estate, but elects to keep it in his own hands, he will then be entitled to recover the difference between the agreed price and the presumed marketable value of the property, together with his costs, charges, and expenses. Amongst these costs and charges may be included the expense of making out the title; for although the expense is, by custom and usage, defrayed by the vendor, yet that is done upon the understanding that the contract will be duly fulfilled by the purchaser. In many cases of sales of realty there will be no difference between the contract price and the marketable value of the property agreed to be purchased; and in such cases, if the vendor elects to keep the property in his own hands, and not to resell it, he will be entitled to recover nominal damages only in respect of the loss of the purchase, in addition to the costs and expenses he has incurred in carrying out and completing his part of the contract.

Damages from Non-Performance by the Vendor. — If a person enters into a contract for the sale of real estate, whether under the belief that he has a good title, or knowing that he has no title, nor any means of acquiring one, the purchaser [*901] cannot *recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit when

(r) *Laird v. Pim*, 7 M. & W. 478.

there is fraud. (s) But where the vendor has a part-interest, he may be decreed to perform specifically so much of the contract as he has power to perform. (t)

Expenses incurred in getting a survey made of the estate, or plans prepared preparatory to the making of the contract, but before the contract was actually entered into, cannot be recovered by the purchaser, nor can the expense of a conveyance prepared before the title has been approved of, and before it is known whether objections raised to the title can be answered by the vendor. (u) And if there has been no written contract of sale binding on the vendor, but the matter rests merely upon an oral agreement rendered invalid by the statute of frauds, the purchaser has no means of recovering the expenses incurred by him in investigating the title. He may, however, recover the deposit and auction duty, as money paid upon a consideration that has failed. (x)

In the case of the non-performance of an agreement for the sale of an estate, damages for non-performance are not given in addition to specific performance, except where special damage has occurred from the delay. (y)

Specific Performance.¹—As the estate agreed to be sold vests in equity in the purchaser from the time of the signing of the agreement, the court will in all ordinary cases decree a specific performance by the vendor of all such acts as are necessary to be done by him to transfer the legal estate to the purchaser, and clothe the latter with the legal as well as the equitable ownership of the property, and thus carry the contract into complete effect. If the vendor has no title, a specific performance cannot be decreed, as he cannot be compelled to convey an estate which he has not got. (z) If, therefore, he has signed an agreement for

¹ See this subject treated again, *post*, p. *1120.

(s) *Flurean v. Thornhill*, 2 W. Bl. 443. As to expenses of producing documents, &c., not in vendor's possession, 1078; *Bain v. Fothergill*, L. R. 7 H. L. 158, overruling *Hopkins v. Grazebrook*, see 44 & 45 Vict. c. 41, sect. 3 (6).

6 B. & C. 31, and other cases following (x) *Gosbell v. Archer*, 2 Ad. & E. that decision; see also *Gray v. Fowler*, 500.

L. R. 8 Ex. 249; 42 L. J. Ex. 61. (y) *Chinnock v. Ely*, 34 L. J. Ch.

(t) *Burrow v. Scammell*, 19 Ch. D. 399; 2 H. & M. 221.

175. (z) *Nicolson v. Wordsworth*, 2

(u) *Hodges v. Earl Litchfield*, 1 Sc. Swanst. 369.

the sale of property under the impression that he was seised in fee, and it subsequently appears that he has only a life estate, or only a moiety of the property, a specific performance of the contract cannot be decreed; but the purchaser may, if he pleases,

have a decree for the conveyance of the life estate or of [* 902] the moiety with * compensation by way of reduction of the amount of the purchase-money. (a) If the remainder, after the determination of the vendor's life interest, is vested in his wife for life, with remainder to his son in fee, the court will not compel him to use his marital and parental authority to induce the wife and son to part with their interests in the property. (b) Where a husband and wife agreed to sell the wife's estate, the purchaser being aware that the estate belonged to the wife, and the wife afterward refused to convey it, it was held that the purchaser could not compel the husband to convey his interest and accept an abated price. (c) The court will not compel a purchaser to take a doubtful title; and a title is regarded as doubtful where there has been a decision adverse to it or the principle upon which it depends, or in favor of it, which the court is of opinion is wrong, or where there is a known difficulty in the title, or when the validity of the title depends upon a fact or facts, of the exact accuracy of which the court has no means of judging. (d)

A contract established through the medium of letters may be enforced in specie; but it must appear to be a complete and concluded contract; (e) and it must be sufficiently certain. (f) The courts grant the decree only in those cases where there is a mutuality of obligation, and where the remedy is mutual. If, therefore, an infant signs a contract for the purchase of an estate, the court will not decree specific performance in his favor, because he is not himself bound by the contract, by

(a) *Barnes v. Wood*, L. R. 8 Eq. 424; 38 L. J. Ch. 683; *Hooper v. Smart*, L. R. 18 Eq. 683; *Horrocks v. Rigby*, 9 Ch. D. 180.

(b) *Howel v. George*, 1 Mad. 6.

(c) *Castle v. Wilkinson*, L. R. 5 Ch. 534; 39 L. J. Ch. 843.

(d) *Mullings v. Trinder*, L. R. 10 Eq. 449; 39 L. J. Ch. 833.

(e) *Huddleston v. Briscoe*, 11 Ves. 591; *Stratford v. Bosworth*, 2 Ves. & B. 341; *Cowley v. Watts*, 17 Jur. 172; *ante*, pp. *15, *16.

(f) *Rummens v. Robins*, 3 De G. J. & S. 88; *Dear v. Verity*, 38 L. J. Ch. 297.

reason of his infancy. (*g*) Specific performance will not be decreed in favor of a person who has been guilty of an unreasonable delay in fulfilling his part of the engagement, or who has slept for a lengthened period over his rights, and comes forward at last, when circumstances have changed in his favor, to enforce a stale demand. (*h*) If the contract of sale provides that immediate possession shall be given to the purchaser, and possession is accordingly taken by him, and the vendor afterward evicts him, the latter forfeits his right to a specific performance. (*i*) If there is a mistake between the parties as to what was sold, or as to the quantity sold, or the price, the court will not in general interfere * in favor of either of them. (*k*) If [* 903] there has been surprise on third parties at a sale by auction, and they have been deterred from bidding, or if the purchaser has made false statements which have kept persons away from the sale, the decree will not be granted in his favor; (*l*) nor will it be granted in any case where there has been misrepresentation, fraud, or deceit, or the plaintiff does not appear before the court with "clean hands"; (*m*) nor where there has been a misapprehension by the defendant to which the plaintiff has by his acts, even unintentionally, contributed; (*n*) nor where a person has been induced to sign an agreement whilst he was in a state of complete intoxication; (*o*) but if the defendant was only a little drunk, and knew what he was about, and there was no fraud, the decree will be made. (*p*) Where owners of a colliery contracted to purchase an estate without disclosing the fact that they themselves had got coal from under

(*g*) *Flight v. Bolland*, 4 Russ. 301; *Beav.* 430; *Day v. Wells*, 30 *Beav.* 220; *Hills v. Croll*, 2 *Phill.* 62, n. (*b*).

(*h*) *Lloyd v. Collett*, 4 *Bro. C. C.* 469; *Alley v. Deschamps*, 13 *Ves.* 225; *Southcomb v. Bishop of Exeter*, 6 *Hare*, 213; 16 *L. J. Ch.* 378; *Colby v. Gadsden*, 34 *Beav.* 416; *Moore v. Marrable*, *L. R.* 1 *Ch.* 217.

(*i*) *Knatchbull v. Grueber*, 3 *Mer.* 124.

(*k*) *Clowes v. Higginson*, 1 *Ves. & B.* 524; *Neap v. Abbott*, *Coop. Ch. Pr.* 333; *Malins v. Freeman*, 2 *Kee.* 25; *Durham (Earl of) v. Legard*, 34 *L. J. Ch.* 589; *Swaisland v. Dearsley*, 29

Beav. 430; *Day v. Wells*, 30 *Beav.* 220; *Tamplin v. James*, 15 *Ch. D.* 215; see *post*, *Mistake*, p. * 1181.

(*l*) *Twining v. Morrice*, 2 *Bro. C. C.* 330; *Mortlock v. Buller*, 10 *Ves.* 305.

(*m*) *Cadman v. Horner*, 18 *Ves.* 10; *Clermont v. Tasburgh*, 1 *Jac. & Walk.* 120; *Phillips v. Duke of Bucks*, 1 *Vern.* 227.

(*n*) *Baskcomb v. Beckwith*, *L. R.* 8 *Eq.* 100; 38 *L. J. Ch.* 586.

(*o*) *Cooke v. Clayworth*, 18 *Ves.* 12; *Say v. Barwick*, 1 *Ves. & B.* 195.

(*p*) *Lightfoot v. Heron*, 3 *You. & C.* 590.

it and were liable for damages, the court declined to enforce the contract in their favor, although they had agreed to give the full value of the property. (q) If a person knowingly contracts for the sale of an estate without a title, and the owner offers to make the seller a title, yet the court will not force the buyer to take it: for every seller ought to be a *bona fide* contractor; (r) but if the vendor has contracted *bona fide* in ignorance of the defect of title, and procures a good title within a reasonable time, and then calls upon the purchaser to complete his contract, and the latter refuses, a decree for specific performance will be granted against the purchaser. (s) Extravagance, unreasonableness, or inadequacy of price form no ground, in general, for refusing the specific performance of a contract, unless "it is such as shocks the conscience and amounts in itself to conclusive evidence of fraud in the transaction." (t) But an exception is made in favor of heirs dealing with their expectancies, and in the case of sales of reversions by them, which are closely scrutinized, and generally discountenanced. (u)

[* 904] * Specific performance will also be decreed in favor of a principal who purchased through the medium of an agent, although the agency was not known or disclosed until after the contract had been signed, unless there was some fraud or misrepresentation in the matter. (x)

If the price to be paid for an estate is to be fixed by a third party, there can, of course, be no action for damages, or decree for specific performance, until the price is fixed. (y) Neither party can be compelled to appoint an arbitrator to name the price; (z) and if an arbitrator is actually appointed, the death of either party before award made will revoke the submission, (a)

(q) *Phillips v. Humphray*, L. R. 6 Ch. 770.

(r) *Tendring v. Loudon*, 2 Eq. Cas. Abr. 680.

(s) *Boehm v. Wood*, 1 Jac. & Walk. 421; *Chamberlain v. Lee*, 10 Sim. 444; *Eyston v. Simonds*, 1 You. & C. C. C. 608.

(t) *Coles v. Trecothick*, 9 Ves. 246; but see *Baker v. Monk*, 33 Beav. 419.

(u) *Sugd. Vend.* 14th ed. 276-287; see, however, the 31 Vict. c. 4, sect. 2,

by which no purchase, &c., made *bona fide*, without fraud or unfair dealing, of any reversionary interest in real or personal estate, is to be opened or set aside merely on the ground of undervalue.

(x) *Hall v. Warren*, 9 Ves. 605.

(y) *Wilks v. Davis*, 3 Mer. 507; *Vickers v. Vickers*, L. R. 4 Eq. 529; 36

L. J. Ch. 946.

(z) *Agar v. Macklew*, 2 Sim. & Stu.

(a) *Blundell v. Brettargh*, 17 Ves. 232.

unless there be mutual covenants between the parties for themselves and their heirs, executors, and administrators, for the conveyance of the estate and payment of the money to be awarded to the vendor. (b) When the person who is to make the valuation is named in the agreement for the sale, the court will compel the vendor to permit the valuation to be made according to the contract. (c) If a party having power to revoke the authority given to the arbitrator to name a price, exercises his power contrary to good faith, the court will not give him any aid or assistance in furtherance of his misconduct. (d) A revocation of the submission after it has been made a rule of court, is a contempt. (e) If an action is brought for specific performance, and a valid contract of sale is clearly established, the court will grant an injunction to prevent either of the parties from doing any act which may be injurious to the estate, such as cutting down timber, removing boundaries, pulling down buildings and walls, presenting to a living, &c.; (f) and the vendor will in general be restrained from reselling the estate and executing a conveyance of the legal estate in the property to a third person. (g) But if the validity of the contract is brought into doubt, or there is good reason for thinking that a final and concluded agreement had not been entered into, the court will decline to interfere by way of injunction.

Sales by trustees will not be enforced by the court if they are improvident sales. "If the trustee has been negligent, not taking that care to preserve the interest of his *cestui que trust* which he ought to have done, it will not permit the party dealing with him *to take advantage of that [*905] negligence;" for the court will not enforce any contract involving a breach of trust. (h) If trustees are authorized and empowered to sell at the request of a tenant for life, the trustees have a discretion which the court has no power or jurisdiction

(b) *Belchier v. Reynolds*, 2 Ken. Ch. C. Part II. 87.

(c) *Morse v. Merest*, Mad. & Geld. 26; *Smith v. Peters*, L. R. 20 Eq. 511.

(d) *Pope v. Lord Duncannon*, 9 Sim. 179.

(e) *Harcourt v. Ramsbottom*, 1 J. & W. 511.

(f) *Crockford v. Alexander*, 15 Ves. 138; *Nicholson v. Knapp*, 9 Sim. 326.

(g) *Echloff v. Baldwin*, 16 Ves. 267.

(h) *Ord v. Noel*, 5 Mad. 440; *Thompson v. Blackstone*, 6 Beav. 472.

to control ; and they cannot, consequently, be compelled to give effect to a contract entered into by the tenant for life, without their concurrence, for the sale of the estate. (i) If trustees acting in the exercise of a power of sale make an agreement for the sale of an estate, the contract binds the estate ; and though by subsequent events it cannot be executed under the power, yet it will be decreed to be specifically performed by those who have acquired the interest in the estate bound by the contract. (k) If an agent authorized to sell by public auction, sells by private contract, a specific performance will not be decreed against the principal, although the estate was sold for a greater price than he required for it. (l) An agreement by one of two joint tenants to sell his share of the joint estate amounts to a severance of the joint tenancy, and a specific performance of the contract will be decreed as against the survivor. (m) A married woman cannot bind herself by a contract to sell her property ; and if a husband agrees to sell his wife's lands, a specific performance cannot be decreed against him. (n)

If after making a contract of sale, the vendor has resold the estate and executed a conveyance to the second purchaser, and the latter has bought and accepted the conveyance, and paid the purchase-money, in ignorance of the first contract of sale, a specific performance of such first contract will not be decreed. But if the second purchaser has bought with notice of the first sale, the first purchaser is entitled to a decree for a specific performance against the vendor and the second purchaser, the latter being considered to take subject to the equity of the first purchaser to have the premises conveyed to him at the price originally agreed upon. (o) If the vendor resells, without having any right in equity so to do, he will be considered as a trustee for the purchaser, reselling the estate for the benefit of the latter, and will be compelled to account to him for the purchase-money. (p) If the vendor is seised in fee or *pur autre vie*, and dies before a conveyance is executed, his heir at law will be

(i) *Thomas v. Dering*, 1 Keen, 729.(k) *Mortlock v. Buller*, 10 Ves. 315.(l) *Daniel v. Adams*, Amb. 495.(m) *Brown v. Raindle*, 3 Ves. 257.(n) *Emery v. Wase*, 8 Ves. 515 ;*Martin v. Mitchell*, 2 Jac. & Walk. 425.(o) *Daniels v. Davison*, 17 Ves. 433.(p) *Daniels v. Davison*, 16 Ves. 255.

decreed to perform the agreement *in specie*, and will be compelled to execute a conveyance of the estate, (q)

* although the purchase-money is not payable to him, [* 906] but to the personal representatives of the vendor. If the latter is only tenant in tail, his agreement to sell cannot be enforced in equity against the issue in tail, although he may have entered into the strongest covenants to that effect, and although a decree of specific performance may have been obtained against him in his lifetime, and he may have died in contempt and in prison for not obeying the decree, and although he may have received part, or even the whole, of the purchase-money ; (r) for the issue in tail claim *per formam doni* from the creator of the estate tail, and not from the tenant in tail himself ; and the court cannot take away their rights by title paramount. But if the entail is barred by the vendor in his lifetime, and his estate is thus converted into a fee, then, as there are no issue in tail, a specific performance will be decreed as against his heir at law. By 3 & 4 Wm. IV. c. 74, it is provided (sect. 47) that, in cases of dispositions of lands by tenants in tail under that act, the jurisdiction of courts of equity shall be altogether excluded in regard to specific performance and the supplying of defects in the execution of the powers of disposition given to tenants in tail by the act, and that no disposition thereof by a tenant in tail in equity shall be of any force, unless such disposition would at law be an effectual disposition under the act. This provision, therefore, prevents the court from treating a contract or covenant to bar an estate tail as an actual bar of the estate, and prohibits a decree for the specific performance of any such contract as against the issue in tail ; yet it does not prohibit the exercise of the old power of enforcing a specific performance of a contract against the tenant in tail himself. By the 11 Geo. IV. & 1 Wm. IV. c. 36, sect. 15, rule (15), the court itself may execute the decree against a tenant in tail in custody for a contempt. (s)

Payment of Purchase-Money into Court. — In certain cases,

(q) *Gell v. Vermedun*, 2 Freem. 199. *Frank v. Mainwaring*, 2 Beav. 126 ; 3 &

(r) *Fox v. Crane*, 2 Vern. 306 ; 4 Wm. IV. c. 74, sect. 47, *infra*.

(s) *Sugd. Vend.* 14th ed. 205.

where an action has been brought for a specific performance, and the purchaser has been let into possession of the property, the purchase-money will be ordered to be paid into court. This has been done where an unexpected delay occurred in making out the title, and the purchaser insisted on his right to retain possession and receive the profits of the land during the delay; (*t*) where the purchaser became insolvent, and attempted to resell the estate; (*u*) where the purchaser, after being let into possession, dealt improperly with the land, cut down timber and underwood, and opened and worked mines; (*x*) where [* 907] the title was accepted * and the purchaser made frivolous objections, still keeping possession of the property.

In some cases, where a purchaser retains possession, and unexpected delay has occurred in the completion of the title, an occupation rent has been fixed and decreed by the court, after deducting interest on the deposit; (*y*) in others a receiver has been appointed; (*z*) and in others the purchaser has been ordered to give up possession or pay the purchase-money into court. (*a*)

Assignment of Contract to purchase Land. — A vendor of land may receive the balance of the purchase-money, and convey the estate to the purchaser, without regard to the receipt of a notice that the purchaser has agreed to assign the contract; for the vendor is not bound to see that the purchaser carries out his agreement with the sub-vendee. But it would be otherwise if the vendor had notice that the contract had been actually assigned, and that the sub-vendee insisted on its being completed with him, instead of with the purchaser. (*b*)

Invalid Sales — Want of Title in the Vendor — Eviction of the Purchaser. — We have already seen that, whilst a contract of sale remains executory, and before a transfer of conveyance under seal has been executed, a purchaser is entitled to recover any

(*t*) *Gibson v. Clarke*, 1 Ves. & B. 500.

(*y*) *Smith v. Jackson*, 1 Mad. 618.

(*u*) *Hall v. Jenkinson*, 2 Ves. & B. 125.

(*z*) *Hall v. Jenkinson*, 2 Ves. & B. 125.

(*x*) *Cutler v. Simons*, 2 Mer. 103; *Buck v. Lodge*, 18 Ves. 450; *Pope v. Great Eastern Railway Company*, 36 L. J. Ch. 60; but see *Robertshaw v. Bray*, 35 L. J. Ch. 844.

(*a*) *Curling v. Austin*, 2 Drew. & Sm. 129.

(*b*) *Shaw v. Foster*, L. R. 5 H. L. 321; 42 L. J. Ch. 49.

deposit he may have paid, if it turns out that the vendor is unable from want of title to transfer the estate or interest he has agreed to sell (*ante*, p. *901); and if the whole purchase-money has been paid in advance, the whole is recoverable. Thus where a contract for the sale and purchase of the residue of a term of nineteen hundred years was entered into, and a deed of assignment of the lease prepared and executed by some of the vendors, and the purchase-money paid and possession given, but before the deed had been completely executed it was discovered that the vendors had no title to the lease, and the purchaser was evicted, it was held that he was entitled to recover the purchase-money, as the vendors had never transferred to him that which they had agreed to sell and he to buy. (c) But if after a deed of conveyance has been executed, and the purchase-money paid, it appears that the vendor had no title, and the purchaser is evicted, the latter cannot recover back the purchase-money, or obtain compensation for the damages he has sustained, if the ordinary covenants for title are not inserted in the deed, and it does not appear upon the face of the *convey- [* 908] ance that any particular estate or interest in the land was bargained for, and covenanted or agreed to be sold. For the purchaser might have protected himself by proper covenants for title; and if he has neglected to do so, he will be deemed to have been content to take such estate or interest in the land as the vendor actually possessed; and having got that, he has got all he bargained for. (d) If he might, by a careful investigation of the title, have discovered that he was buying another man's property and not the estate of the vendor, he is concluded by his own laches, unless there has been actual fraud on the part of the vendor. (e)

(c) *Johnson v. Johnson*, 3 B. & P. 126; *Farrer v. Nightingall*, 2 Esp. 639; *Cripps v. Reade*, 6 T. R. 666; *Cod. lib.* 8, tit. 45, lex 5. *Goodtitle v. Morgan*, 1 T. R. 762; *Roswel v. Vaughan*, Cro. Jac. 196; *Chapman v. Speller*, 14 Q. B. 624; 19 L. J. Q. B. 239; *Delmer v. McCabe*, 14 Ir. C. L. R. 377; *Anon.*, 2 Ch. C. 19; *Maynard v. Moseley*, 3 Swanst. 655; *Clare v. Lamb*, L. R. 10 C. P. 334.

(d) *Bree v. Holbech*, 2 Doug. 655; *Johnson v. Johnson*, 3 B. & P. 170; *Duke v. Barnett*, 2 Coll. C. C. 337; *Wakeman v. Duchess of Rutland*, 3 Ves. 235; *Browning v. Wright*, 2 B. & P. 23; *Thackeray v. Wood*, 34 L. J. Q. B. 226; (e) *Anon.*, 2 Ch. C. 19; *Maynard v. Moseley*, 3 Swanst. 655.

Qualified Covenants for Title. — With respect to conveyances made after 31st December, 1881, provisions are contained in the Conveyancing and Law of Property Act, 1881, whereby in most conveyances, covenants relating to title, "right to convey," "quiet enjoyment," "freedom from incumbrance," "further assurance," "validity of lease," "payment of rent and performance of covenants," are to be implied in certain cases. (*f*) If the vendor by the conveyance transfers the premises so far as he himself possesses them or can grant them, and covenants that, notwithstanding any act done by him, he hath in himself good right to grant and assure, &c., he limits his covenants for title to that which he actually has, or but for his own act would have had, to convey, and does not give a general and absolute warranty of title. (*g*) So by the Scotch law, "When one sells with warrandice from fact and deed, the intention is not to sell the subject absolutely, which would be the same as selling it with absolute warrandice, but only to sell it so as the seller himself has it, — that is, to sell what title and interest he has in the subject. The purchaser takes upon himself all other hazards; and, therefore, if eviction happen otherwise than through the fact and deed of the disponent, he bears the loss." (*h*)

In the Roman law, if the vendor was not in the actual possession of the subject-matter of the sale, and was not clothed with the visible and apparent ownership of it, but sold only a naked title or right to a thing which was in the possession of [* 909] a third party, it was considered to be the duty of the purchaser to inquire into the title of the vendor before he entered into the contract of sale. (*i*) But whenever a person sold property of which he had the actual possession, and the visible and apparent ownership at the time of sale, there was an

(*f*) 44 & 45 Vict. c. 41, sect. 7. Amongst other exceptions, this section does not apply to a demise by way of lease at a rent (5). *ignorari non debuit quod jus alienum emit*" (Hobart, 99, Broom's Maxims, 2d ed.), applies to the question of title as between the purchaser of property sold by a person who had no right to sell it, and the true owner, who claims it, rather than to the question of compensation as between the vendor and his immediate purchaser.

(*g*) Thackeray v. Wood, 33 L. J. Q. B. 275; 34 L. J. Q. B. 226.

(*h*) Craig v. Hopkins, 2 Collect. Decisions, 517, 518; Brown's Law of Sale, 279.

(*i*) The maxim, "Caveat emptor, qui

implied warranty of title on the part of the vendor; and if the purchaser was evicted, he had a claim to restitution of the price and to compensation for all the loss and damage he had sustained by the eviction; (*k*) and in the case of sales of hereditary estates, the heir was bound by the warranty of his ancestor. (*l*) By the Code Napoléon, "although at the time of the sale no stipulation was made respecting warranty, the seller is obliged by law to warrant the purchaser against eviction and against incumbrances not declared at the time of the sale." (*m*) "In the Scotch law," observes Mr. Bell, "although there be no express stipulation of warrandice, there is an implied convention, where a full, onerous consideration is given for the conveyance, that the transference shall be effectual; and this not merely to the effect of restoring the consideration given, but of indemnifying the grantee in all respects for the loss, &c., in case of eviction." (*n*) In the Roman law, a formal stipulation was frequently superadded to the contract of sale by the parties, binding the vendor to defend the possession of the purchaser, and in case of eviction to pay him double the amount of the price. (*o*)

By the common law, the words "give" or "grant" in a deed of feoffment, or any equivalent words passing the estate, raised an implied covenant on the part of the grantor to warrant and defend and secure to the grantee the estate or interest granted, which implied covenant was annexed to the estate and ran with the land (*post*, p. * 1273), so that the right to take advantage of it passed to the heirs and assigns of the grantee, who might, in case of eviction by title paramount, sue the grantor upon the covenant. Now, however, by the 8 & 9 Vict. c. 106, sect. 4, it is enacted, "that the word 'give' or the word 'grant' in a deed shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word 'give' or the word 'grant' may, by force of any act of parliament, imply a covenant." Consequently, if the purchaser of an estate be evicted, he has no longer any remedy against the grantor upon any

(*k*) Cod. lib. 8, tit. 45 (*De Evictionibus*), lex 6; Dig. lib. 21, lex 1, 60, 70. Pothier, *Contrat de Vente*, No. 83 to No. 233.

(*l*) Cod. lib. 8, tit. 45, lex 20; Domat, liv. 1, tit. 2, sects. 6, 10. (*n*) 1 Bell's Com. p. 644.

(*o*) Dig. lib. 21, tit. 2, lex 6.

(*m*) Code Napoléon, liv. 3, sect. 3;

[* 910] implied covenant for title or * quiet enjoyment. (oo) But if the deed of conveyance recites that the vendor is seised of an estate in fee, and that he has agreed to sell such an estate, this amounts to an express covenant that he is so seised, and has a right to convey such an estate to the purchaser; (p) and if he was not seised in fee, and no fee in the lands passed by the conveyance, he would be responsible in damages for a breach of covenant. Where a man had bought his own estate in ignorance of his title, and accepted a conveyance thereof, and paid the purchase-money, the vendor was compelled to repay the amount; "for there being a plain mistake, the court cannot suffer the vendor to run away with the money in consideration of the sale of an estate to which he had no right." (q) The defendant contracted to buy of the plaintiff, under condition that one E. M. was seised in fee in 1841. He then contracted to sell to a sub-purchaser. It was discovered that the defendant, and not E. M., was seised in fee, subject to a leasehold interest in the plaintiff. It was held that, as both parties had been under a misapprehension, there was a common mistake, and the court would relieve. (r) If a man having nothing at all to sell, bargains as if he had, and thereby prevails on another party to become a purchaser and pay him money or give him a bond, that is what is called a fraud in equity, although the vendor might have thought at the time that he had something to sell. (s) Therefore "if I sell you a thing which, without the knowledge of either of us, has ceased to exist, there will be no contract." (t)

If a vendor affirms that he is the owner of certain property, believing what he says to be true, and so induces another party to buy, an action for deceit will not lie against him if the purchaser was furnished with the means of ascertaining for himself the truth or falseness of the representation. (u) The mere asser-

(oo) The word "grant" is no longer necessary, and the word "convey" will probably be used: 44 & 45 Vict. c. 41, sect. 49; and see sect. 7 as to implied covenants for title, &c., by beneficial owners, &c.

(p) *Severn v. Clerk*, 1 Leon. 122; *Barfoot v. Freswell*, 3 Keb. 465.

(q) *Bingham v. Bingham*, 1 Ves. Sen. 126.

(r) *Jones v. Clifford*, 3 Ch. D. 779.

(s) *Hitchcock v. Giddings*, 4 Pr. 141.

(t) Cod. lib. 4, tit. 38; Domat, liv. 1, tit. 2, sects. 10, 24; Pothier, *Obligations*, No. 6; *Taylor v. Caldwell*, 3 B. & S. 837; 33 L. J. Q. B. 164.

(u) *Roswell v. Vaughan*, Cro. Jac. 196.

tion by a vendor that he has a good title, on the faith of which the purchaser relies without investigation, is not necessarily such a misrepresentation as will preclude the vendor from enforcing the contract, where, at the time of making the representation, he was ignorant of the defect in his title. (*x*) But if the vendor knew at the time that his title was defective, and kept back the fact from the purchaser, this is a fraudulent concealment which avoids the contract *ab initio*, and entitles the purchaser to recover back his purchase-money; (*y*) and in such a case the * court will not allow him to force the title upon the [* 911] purchaser, although in the conditions of sale he has employed general words large enough to include the defect. (*z*) In every contract of sale there is an implied undertaking or covenant, according as the contract may or may not be under seal, that the vendor does *not*, at the time he assumes to be the owner of the property and to have a right to sell it, *know* that he is not the owner and has no right to sell; and if the knowledge of his want of title can be brought home to him, there is a direct breach of this implied undertaking or covenant, which will enable the purchaser to recover all the damages he has sustained. (*a*) If an action is brought by a vendor to compel a specific performance by a purchaser of a contract of sale, and the purchaser pays the purchase-money without putting in an answer, and afterward discovers that he was deceived and defrauded by the vendor, he is not precluded from bringing an action against the latter and recovering damages, if he comes speedily after discovering the fraud. (*b*)

Breach of Covenants for Title.—If after the purchase has been completed by the execution of the conveyance and payment of the purchase-money, it is discovered that the vendor had no title to the estate he professed to sell, and the purchaser is evicted, and brings his action for a breach of the ordinary

(*x*) *Hume v. Pocock*, L. R. 1 Ch. 379; 35 L. J. Ch. 731.

(*y*) *Edwards v. M'Leay*, Coop. Ch. 313; 2 Swanst. 287; *Early v. Garrett*, 9 B. & C. 932.

(*z*) *Edwards v. Wickwar*, L. R. 1 Eq. 68; 35 L. J. Ch. 48.

(*a*) *Peto v. Blades*, 5 Taunt. 657; *Furnis v. Leicester*, Cro. Jac. 474; *Crosse v. Gardner*, Carth. 90; *Harding v. Freeman*, Styles, 310; *Warner v. Tallard*, 1 Rol. Abr. 94; *Mostyn v. West Mostyn Coal Co.*, 1 C. P. D. 145.

(*b*) *Jendwine v. Slade*, 2 Esp. 572.

covenants for title and quiet enjoyment, the measure of damages will be the amount of purchase-money paid for the estate, and all incidental damages flowing from the breach of contract, such as the costs and expenses of preparing the conveyance and investigating the title. If the breach has not been followed by any eviction of the purchaser, the latter should wait until the ultimate damage has been sustained by eviction; and he may then recover the whole amount of purchase-money paid, with interest, and his costs and expenses. But he cannot do this so long as he has not been disturbed in his possession and enjoyment of the property. (c) "If," observes Domat, "the thing sold is diminished in value by the effect of time, or from other causes, so that it is worth less at the time of the eviction than the price paid by the purchaser, the latter is entitled to recover from the vendor only the diminished value as it existed at the time of the eviction; for it is only in that value that the purchaser's [* 912] loss doth consist. The diminution in value * which preceded the eviction regarded only the purchaser, who ought not to be made a gainer by the eviction." (d)

If between the time of the execution of the conveyance and the period of eviction, the purchaser has expended money upon the land in drainage, buildings, and improvements, he will not be allowed to recover from the vendor the amount of capital so expended, unless the latter has been guilty of a downright fraud in the sale of the estate; (e) neither could he by the common law recover the money so expended from the party who evicted him; he sustained, therefore, in general, a dead loss of the amount. But in equity, if the land was known to have been purchased for the erection of buildings, and the purchaser was evicted after having expended money in building, the purchaser had, in certain cases, a claim upon the land for the amount of his expenditure. (f) In the civil law, the purchaser was entitled to be reimbursed the money he had expended in improvements, and had a lien upon the estate for the amount. If the vendor

(c) 2 Saund. 181 b; Shep. Touch. Lewis v. Campbell, 8 Taunt. 715; 3 B. 170; King v. Jones, 5 Taunt. 428; *ante*, & Ald. 392; Worthington v. Worthington, 8 C. B. 134.

(d) Domat, liv. 1, tit. 2, sect. 10.

(f) Bunny v. Hopkinson, 29 L. J.

(e) Dallas, C. J., and Richardson, J., Ch. 93; 27 Beav. 565.

had been guilty of a fraud in making the sale, and had knowingly sold the property of another man, he was bound to make good to the purchaser the capital expended by the latter; but if there was no fraud in the case, and the vendor sold under a mistake, it was considered that the expense of the improvements ought to fall upon the person who evicted, rather than upon the vendor; (g) and the former consequently could not obtain possession of the estate without paying the value of the improvements. The vendor in this case had to indemnify the purchaser according to what the estate would have been worth at the time of the eviction, if it had not been improved; and the evicting party had to make good the improvements, and was never allowed to reap the profit of them. "In making an estimate of these improvements," observes Domat, "we must set the expense of making them against the profits the purchaser has received from them, so that if the profits he has received equal the expenditure of the principal and interest he laid out, there will be no reimbursement due, it being enough for the purchaser that he loses nothing. If the profits come short of the expenditure, the purchaser will be entitled to the difference." (h) If the purchaser has not been evicted, but has entered into a fair compromise with the real * owner or party having [* 913] title paramount, he will be entitled to recover the whole amount paid by way of compromise, together with his costs and expenses. (i) If an estate has been sold as freehold, with a general covenant that the vendor is seised in fee, and the estate proves to be a copyhold estate, the measure of damages will be the difference between the value of a freehold and copyhold estate. (k)

Non-Payment of Purchase-Money after the Execution of a Conveyance.—If the conveyance expresses, contrary to the fact,

(g) "Si mihi alienam aream vendideris, et in ea ego ædificavero, atque ita eam dominus evincit; nam, quia possum petentem dominum, nisi impensam ædificiorum solvat, doli mali exceptione summovere, magis est, ut ea res ad periculum venditoris non pertineat." — *Dig.*

lib. 19, tit. 1, lex 45, sect. 1; Cod. lib. 8, tit. 45, lex 16.

(h) Domat, liv. 1, tit. 2, sect. 10; Poth. Vent. No. 133–135; Cod. lib. 8, tit. 45; 1 Bell's Comm. 645.

(i) *Smith v. Compton*, 3 B. & Ad. 407.

(k) *Gray v. Briscoe*, Noy's R. 142.

that the purchase-money is paid, though the legal estate passes, yet the purchaser will not be permitted to possess and enjoy the estate for his own use, benefit, and advantage, unless he pays down the purchase-money. (*l*)

Sale of Pretenced Titles. — By the 32 Hen. VIII. c. 9, sect. 2, no person shall bargain for, buy, or sell, or obtain, or grant, or covenant to have any "pretenced rights or titles" of any person to any lands, &c., unless he or his ancestors, or the parties through whom he claims, have been in possession of the same, or the reversion or remainder thereof, or taken the rents or profits thereof, for one year. But persons in possession of lands, &c., and in receipt of the rents and profits thereof, may buy (sect. 4) or acquire the pretenced title of other persons afterward to be made. "A pretenced right or title is where one is in possession or receipt of the rents and profits of lands, &c., as owner, and another that is out of possession claims them." (*m*) A person, therefore, who has been turned out of possession and deprived of the rents and profits of land to which he is entitled has no salable interest. He may enforce his right through the medium of an action, and when he has got possession of the land he may then sell it; but he cannot sell or transfer his right of action. (*n*) Since the passing of the 8 & 9 Vict. c. 106, sect. 6, a grant of lands to which the grantor has a title in fact, though he has never been in possession, will be valid, although litigation is pending. (*nn*)

Fraudulent Concealment — Avoiding Sales of Realty. — Where a vendor, knowing that he has no right or title to property, or being cognizant of the existence of incumbrances or outgoing upon it, or of latent defects materially lowering its value in the market, sells it, and neglects to disclose such defects to the purchaser, (*o*) there is a fraudulent concealment vitiating

(*l*) *Winter v. Lord Anson*, 1 Sim. & Stu. 444; 1 Russ. 488; see *In re Brentwood Brick Co.*, 5 Q. B. D. 562.

(*m*) *Partridge v. Strange*, Plowd. 88; *Jenkins v. Jones*, *infra*.

(*n*) *Doe v. Evans*, 1 C. B. 717; the 32 Hen. VIII. c. 9, contains prohibitions against maintenance, champerty, and embracery.

(*nn*) *Jenkins v. Jones*, 9 Q. B. D. 128.

(*o*) *Edwards v. M'Leay*, 2 Swanst. 287; *Coop. Ch. C.* 308; *Peto v. Blades*, 5 Taunt. 657; *Wilson v. Fuller*, and *Fuller v. Wilson*, 3 Q. B. 58, 68; *Shirley v. Stratton*, 1 Br. C. C. 440.

the * contract; and conditions of sale, not drawn *bona* [* 914] *fide*, but intended to cover difficulties arising from such uncommunicated defects, will not preclude the purchaser from objecting to them. (*p*) So it is where the vendor of a lease which becomes forfeited if the premises are not put into repair after notice, receives such notice, and then sells the premises in a dilapidated state without informing the purchaser of the notice. (*q*) There may also be a fraudulent concealment by a purchaser which will vitiate a sale, as where a person having secret information of the death of one of two tenants for life, went and purchased the reversion without disclosing the fact to the reversioners, of whom he bought. (*r*) But in a general sale of an estate, if the vendor has said or done nothing to throw the purchaser off his guard or to conceal a patent defect, there is no fraudulent concealment on the part of the vendor; (*s*) the purchaser has an opportunity of inspecting and judging for himself; and the principle of *caveat emptor* applies. (*t*) Where a meadow is sold without any notice being given to the purchaser of a public footway around the meadow and another across it, there is no fraudulent concealment on the part of the vendor. "Certainly," observes the Lord Chancellor, "the meadow is very much the worse for a road going through it; but I cannot help the carelessness of the purchaser who does not choose to inquire. It is not a latent defect." (*u*) So where property was sold which was represented as standing on a fine vein of anthracite coal, it was held that it was the business of the purchaser to inquire as to the extent to which the coal had already been worked. (*x*) On the other hand, the purchaser may use his own knowledge, and is not bound to give the vendor information of the value of the property; as if an estate is offered for sale, and I treat for it, knowing that there is a mine under it, and the vendor makes no inquiry, I am not bound to give him any information of it. (*xx*)

(*p*) *Jackson v. Whitehead*, 28 Beav. 154; *Hume v. Pocock*, L. R. 1 Ch. 379; 35 L. J. Ch. 731.

(*q*) *Stevens v. Adamson*, 2 Stark. 422.

(*r*) *Turner v. Harvey*, 1 Jac. 169.

(*s*) *Jones v. Bright*, 3 Moo. & P. 175; F. N. B. 94, C.

(*t*) *Turner v. Harvey*, 1 Jac. 169.

(*u*) *Bowles v. Round*, 5 Ves. 509.

(*x*) *Colby v. Gadsden*, 34 Beav. 416.

(*xx*) *Turner v. Harvey*, 1 Jac. 169.

Sale with all Faults, or without Allowance for any Defect or Error. — If it be made a term of the contract that the subject-matter of the sale is to be taken with all faults, the term or stipulation will release the vendor from the obligation of disclosing all such defects as are susceptible of discovery by a rigid examination of the subject-matter of sale. (y) Where the vendor of a house, being conscious of a defect in the main wall, plastered it up and papered it over, for the purpose of [* 915] concealing it from the * purchaser, it was held that this was a direct fraud, which avoided the contract of sale and enabled the purchaser to recover back the purchase-money. (z)

SECTION II.

OF ORDINARY CONTRACTS FOR THE BUYING AND SELLING OF GOODS AND CHATTELS.¹

Legal Authentication of Executory Contracts for the Sale of Goods and Chattels.² — We have already seen that, by the seventeenth section of the statute of frauds, it is enacted that no contract for the sale of any goods, wares, and merchandises, for the price of £10 and upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind

¹ Upon the general subject of sales of personal property there are — besides the American editions of Benjamin's treatise (3d ed. 1881, by Bennett, is recent, and ably annotated) — Story, *Sales* (4th ed. 1871); Langdell, *Select Cases on Sales*; 2 Schouler, *Pers. Prop.* Part VI., Title to personal property by sale; Browne, *Stat. Fr.*, c. 14, *Sales of Goods, &c.*; c. 15, *Acceptance and receipt*; c. 16, *Earnest and part payment*; Rorer, *Jud. Sales*, c. 11, *Judicial sales of personal property*; c. 19, *Execution sales of personal property*; Freeman, *Void Jud. Sales*; Landreth, *Sale* (1880). The American decisions are collected in *U. S. Dig. and Ann. Dig. tit. Sales*.

² See *ante*, p. * 159, American note 1; *ib.* p. * 164, American note.

(y) *Pickering v. Dowson*, 4 Taunt. 779.

(z) *Anon.*, cited by Gibbs, J., *Pickering v. Dowson*, 4 Taunt. 785.

the bargain or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized (*ante*, p. * 164).¹⁰⁰

Requisites of the Memorandum.⁸ — We have already seen that the note or memorandum of the bargain should disclose the names of the vendor and purchaser, or their agents, (a) the thing sold, and the price to be paid, if the price was fixed and agreed

⁸ The following States adopt the English rule that the consideration must be expressed in the memorandum, — Delaware (*Weldin v. Porter*, 4 Houst. 236); Georgia (*Henderson v. Johnson*, 6 Ga. 390); Indiana (*Gregory v. Logan*, 7 Blackf. 112); Maryland (*Wyman v. Gray*, 7 Harr. & J. 409; *Elliott v. Giese*, ib. 457; *Edelen v. Gough*, 5 Gill, 103); Michigan (*Jones v. Palmer*, 1 Doug. 379); Minnesota (*Nichols v. Allen*, 23 Minn. 542); New Hampshire (*Neelson v. Sanborne*, 2 N. H. 414; *Underwood v. Campbell*, 14 N. H. 393); New Jersey (*Laing v. Lee*, 1 Spencer, 337; but see *Buckley v. Beardsley*, 2 South. 570); New York (*Miller v. Cook*, 23 N. Y. 495; *Parker v. Wilson*, 15 Wend. 346; *Gates v. McKee*, 13 N. Y. 232; *Bennett v. Pratt*, 4 Den. 278; *Rogers v. Kneeland*, 10 Wend. 218, 256; *Newbery v. Wall*, 65 N. Y. 484; *Stone v. Browning*, 68 N. Y. 598; *Castle v. Beardsley*, 10 Hun, 343); Pennsylvania (*Soles v. Hickman*, 20 Pa. St. 180); South Carolina (*Meadows v. Meadows*, 3 McCord, 458; *Stephens v. Winn*, 2 Nott & M. 372); Wisconsin (*Reynolds v. Carpenter*, 3 Chand. 31; *Taylor v. Pratt*, 3 Wis. 674).

But the consideration may be collected from the whole instrument, and the words "value received" have been held sufficient. *Cooper v. Dedrick*, 22 Barb. 516; *Howard v. Holbrook*, 9 Bosw. 237; *Douglas v. Howland*, 24 Wend. 35; *Watson v. McLaren*, 19 Wend. 557; *Rogers v. Kneeland*, 10 Wend. 218; *Waterbury v. Graham*, 4 Sandf. 215; *Castle v. Beardsley*, 10 Hun, 343; *Edelen v. Gough*, 5 Gill, 103; *Laing v. Lee*, 1 Spencer, 337; *Day v. Elmore*, 4 Wis. 190. See, further, *Gowen v. Klous*, 101 Mass. 449; *Smith v. Arnold*, 5 Mas. 416; *Carr v. Pascaic Land Improvement, &c. Co.*, 19 N. J. Eq. 424; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446; *Atwood v. Cobb*, 16 Pick. 227; *Bird v. Richardson*, 8 Pick. 252; *Ide v. Stanton*, 15 Vt. 685; *Kay v. Curd*, 6 B. Monr. 100; *Adams v. McMillan*, 7 Port. 73; *Ellis v. Deadman*, 4 Bibb, 467; *Waul v. Kirkman*, 27 Mo. 823.

Other States reject the English rule, even though the same language is used in their statutes, — Connecticut (*Sage v. Wilcox*, 6 Conn. 81); Maine (*Cummings v. Dennett*, 26 Me. 399; *Gilligan v. Boardman*, 29 Me. 81; *Levy v. Merrill*, 4 Greenl. 189); Massachusetts (*Packard v. Richardson*, 17 Mass. 122, confirmed by statute; Gen. Sts. c. 105, sect. 2); Missouri (*Halsa v. Halsa*, 2 Mo. 103); North Carolina (*Miller v. Irvine*, 1 Dev. & B. L. 103; *Ashford v. Robinson*, 8 Ired. L. 114); Ohio (*Reed v. Evans*, 17 Ohio, 128); Texas (*Adkins v. Watson*, 12 Tex. 199). See, further, *Thompson v. Hall*, 16 Ala. 204; *Dorman v. Bigelow*, 1 Fla. 281; *Violet v. Patton*, 5 Cranch, 151; *Wren v. Pearce*, 4 Smed. & M. Ch. 91; *Taylor v. Ross*, 3 Yerg. 330; *Gilman v. Kibler*, 5 Humph. 19; *Campbell v. Findley*, 3 Humph. 330; *Ratcliff v. Trout*, 6 J. J. Marsh. 606.

(a) *Ante*, p. * 164.

¹⁰⁰ See Appendix, Vol. III.

upon at the time of the making of the contract; (b) but if no price was positively and definitely fixed and agreed upon, the note or memorandum will be sufficient without any statement of price, and the law will infer that a reasonable price was to be paid. (c) Any note or entry in a book or ledger, or any letter acknowledging the fact of the sale, mentioning the name of the vendor and the thing sold, and signed by the purchaser or his agent, will take the case out of the statute, (d) although it subsequently contains a repudiation of the bargain on bad and insufficient grounds. (e) The contract may also be authenticated and established through the medium of bills of parcels, entries in books, letters, and separate writings, provided [* 916] they refer to each * other and to the same persons and things, and manifestly relate to the same contract and transaction. (f) Where divers articles ordered by the defendant were entered in the plaintiff's order-book, and the defendant wrote his name at the foot of the entry, it was held that the entry and signature of the defendant might be taken in connection with an entry of the plaintiff's name in the book showing the book to be his book, so as to establish the requisite written memorandum of the contract. (g) Where goods were sold by auction to an agent acting on behalf of an undisclosed principal, and the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, in the printed catalogue, it was held that the entry in the catalogue and a letter afterward written by the principal to the agent, recognizing the purchase, might be coupled together to constitute and establish the requisite written memorandum of the contract. (h) And where a buyer wrote to the seller: "I give you notice that the corn you delivered to me, in part perform-

(b) *Elmore v. Kingscote*, 5 B. & C. 583; 8 D. & R. 343; *Goodman v. Griffiths*, *ante*, p. * 173.

(c) *Hoadly v. MacLaine*, 4 M. & Sc. 340; 10 Bing. 482; *Joyce v. Swann*, 17 C. B. n. s. 103; *Acebal v. Levy*, 4 M. & Sc. 217, 227, 229; *Valpy v. Gibson*, 4 C. B. 864; 16 L. J. C. P. 248.

(d) *Newell v. Radford*, L. R. 3 C. P. 52; 37 L. J. C. P. 1; *ante*, p. * 173.

(e) *Bailey v. Sweeting*, 9 C. B. n. s. 843; 30 L. J. C. P. 150; *M'CLean v. Nicolle*, 9 W. R. 811.

(f) *Saunderson v. Jackson*, 2 B. & P. 238; *Allen v. Bennett*, 3 Taunt. 169.

(g) *Sarl v. Bourdillon*, 1 C. B. n. s. 195; 26 L. J. C. P. 78.

(h) *Phillimore v. Barry*, 1 Campb. 513; *Gibson v. Holland*, L. R. 1 C. P. 1; 35 L. J. C. P. 5.

ance of my contract with you for one hundred sacks of good English seconds flour, at 45s. per sack, is so bad that I cannot make it into salable bread," and the seller replied: "I have your letter or notice of the 24th September, in reply to which I have to state that I consider I have performed my contract as far as it has gone," it was held that the first letter and the answer might be coupled together and incorporated, and were sufficient evidence in writing to satisfy the terms of the statute of frauds, and enable the buyer to sue the seller for the non-delivery of an article corresponding with that mentioned in the buyer's letter. (i)

But if there is any material discrepancy between the letters and entries, — if they describe the quality and quantity of the thing sold differently, or vary in the statement of the terms of the contract, and do not recognize the same contract and refer to the same transaction, — they will fail in establishing the bargain. (k) Where the entry and the letter referred to different contracts, the one being evidence of an absolute and unconditional contract of sale, and the other of a qualified and conditional bargain, it was held that the plaintiff could not avail himself of the letter for one purpose, — to bind the defendant within the statute, — and renounce it for another purpose, but that he must take it altogether; and then it was no recognition, but a repudiation, of the contract sought to be * established by the entry. (l) But if the letter acknow- [* 917] ledges the essential particulars of the contract, and then repudiates it on bad or insufficient grounds, there will, as we have seen, be a good memorandum of the bargain. (m)

Brokers' Bought and Sold Notes. — When sales are effected through the medium of brokers acting between the parties buying and selling, the broker is the agent of both parties, and as such may bind them by signing the same contract on behalf of buyer and seller. But where the broker delivers notes of the contract materially differing in their terms, and there is no

(i) *Jackson v. Lowe*, 7 Moore, 219, 108; *Richards v. Porter*, 6 B. & C. 437; 228; 1 Bing. 9. *Archer v. Baynes*, 5 Exch. 625; 20 L. J.

(k) *Smith v. Surman*, 9 B. & C. 561, Ex. 55.

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(m) *Ante*, p. * 916.

(l) *Cooper v. Smith*, 15 East, 103,

signed entry in the broker's books to cure the discrepancy, there is no proof of the assent of the parties to the same terms, and no valid bargain between them. (*n*) It is the duty, but not always the practice, of brokers to make a memorandum of the contract in their books, to sign such memorandum, and to transcribe therefrom the bought and sold notes. If these notes are signed by the broker and agree, but differ from an unsigned entry in the book, the notes constitute the contract. If they agree, but differ from a signed entry, and the signed notes so agreeing have been received and adopted by the vendor and purchaser, they will, it seems, constitute a new contract in substitution and extinguishment of the contract evidenced by the signed entry. (*o*) If they differ from each other, and one of them agrees with the signed entry, the entry and note agreeing with it may, it seems, be taken together as constituting the contract, to the exclusion of the other note. A broker in his book signed both the bought and sold note, but he did not sign the note he sent to the purchaser, who declined to accept on that ground; it was held that the purchaser by his conduct admitted that the broker had his authority, and consequently he was bound by the sold note signed and sent to the seller, and also that the entry in the broker's book was a sufficient memorandum to satisfy the statute of frauds. (*p*) "A broker has only a special authority, not a general one; and if you employ a broker to buy one kind of goods, and he buys another, you are not bound by his act." (*q*) In an action by the purchaser against the vendor on a contract made through a broker, it is sufficient for the [* 918] * purchaser to produce the bought note handed to him by the broker, and to show the employment of the latter by the vendor. If the sold note varies from the bought note, it lies on the vendor to prove that variance by producing the sold

(*n*) *Grant v. Fletcher*, 5 B. & C. 437; *Q. B.* 103; 20 L. J. Q. B. 535; *Townend v. Drakeford*, 1 Car. & K. 22; *Goom v. Ruck*, 4 Q. B. 747; *Thornton v. Affalo*, 9 D. & R. 148; 6 B. & C. 117; *Kempster*, 5 Taunt. 786, 788. But an unimportant or immaterial variation will not avoid the bargain. *Maclean v. Dunn*, 1 Moo. & P. 778, 779.

(*o*) *Thornton v. Charles*, 9 M. & W. 807, 808; *Siewewright v. Archibald*, 17

(*p*) *Thompson v. Gardiner*, 1 C. P. D. 777.

(*q*) *Pitts v. Beckett*, 13 M. & W. 743, 747; *Bostock v. Jardine*, 34 L. J. Ex.

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note. (*r*) So if the action be brought against the purchaser for not accepting goods sold, the sold note bearing the signature of the broker acting for both buyer and seller is a sufficient memorandum of the bargain. (*s*) An apparent variance between bought and sold notes may be explained by mercantile usage. (*t*) Letters constituting a sufficient contract to satisfy the statute of frauds are not abrogated and annulled by bought and sold notes differing from them, unless it plainly appears that the notes were to constitute the contract to the exclusion of the letters. (*u*)

When the Broker is himself liable upon the Contract.¹—A usage of trade to the effect that, whenever a broker purchases or sells for his principal without disclosing the name of such principal, the broker himself is liable to be looked to as purchaser or seller, may be given in evidence to fix the broker on the contract. (*x*)

Of the Signature to the Memorandum.—The question as to what is and what is not a signing of a contract so as to meet the requirements of the statute of frauds has already been considered (*ante*, pp. * 175—* 178).

Acceptance and Actual Receipt of Goods within the Statute of Frauds.²—We have already seen that “no contract for the

¹ Where goods are sold to a person who is in fact agent for another, and on his credit, but without seller's knowledge of the agency, the seller on discovering the principal has the right to elect to make him the debtor. *Merrill v. Kenyon*, 48 Conn. 314.

² As to what acts will constitute acceptance and receipt, see *Shindler v. Houston*, 1 N. Y. 261; *Shepherd v. Pressey*, 32 N. H. 57; *Hawley v. Keeler*, 53 N. Y. 114; *Gibson v. Stevens*, 8 How. 384; *Frostburg Min. Co. v. New England Glass Co.*, 9 Cush. 115; *Bowers v. Anderson*, 49 Ga. 143; *Knight v. Mann*, 118 Mass. 143; *Safford v. McDonough*, 120 Mass. 290; *Remick v. Sandford*, ib. 316; *Hewes v. Jordan*, 39 Md. 479; *Clarke v. Marriott*, 9 Gill, 331; *Stone v. Browning*, 51 N. Y. 211; *Young v. Blaisdell*, 60 Me. 272; *Marsh v. Rouse*, 44 N. Y. 643; *Dole v. Stimpson*, 21 Pick. 384; *Edwards v. Grand Trunk Ry. Co.*, 54 Me. 111; *Brabin v. Hyde*, 32 N. Y. 519; *Brewster v. Taylor*, 63 N. Y. 587; *O'Brien v. Credit*

(*r*) *Hawes v. Forster*, 1 Mood. & Rob. 368.

(*s*) *Parton v. Crofts*, 16 C. B. n. s. 11; 33 L. J. C. P. 189; *Thompson v. Gardiner*, 1 C. P. D. 777.

(*t*) *Bold v. Rayner*, 1 M. & W. 343; *Kempson v. Boyle*, 3 H. & C. 763; 34 L. J. Ex. 191.

(*u*) *Heyworth v. Knight*, 17 C. B. n. s. 298; 33 L. J. C. P. 298.

(*x*) *Humfrey v. Dale*, 7 El. & Bl. 266; *Ell. Bl. & Ell.* 1004; 27 L. J. Q. B. 390; *Fleet v. Murton*, L. R. 7 Q. B. 126; 41 L. J. Q. B. 49.

sale of goods for the price of £10 or upwards is good, unless the buyer has accepted part of the goods sold and actually received the same, or given something in earnest," &c. (*ante*, p. * 164). The acceptance of the goods may be either before or at the time of the receipt of them. Thus if the purchaser selects the goods himself, and orders them to be sent to his residence or place of business, and the selected goods are sent and delivered to him or his servant at the place indicated by him, there is evidence of an acceptance and an actual receipt of the goods within the meaning of the statute. (y) If there has been an acceptance and an actual receipt of the thing only for an instant, the purchaser is bound by the bargain, and cannot afterward withdraw his acceptance and reject the article, except on the ground of fraud.

Thus where the purchaser selected some sheep from the [* 919] plaintiff's flock, and had them sent down to * his own residence, and there counted them over, and said, "It is all right," and then sent them into his field, and the day after refused to keep them, saying they were not the sheep he bought, it was held that there was evidence for the jury of an acceptance of the sheep, and that if the defendant had once really accepted them, his rejection of them afterward would be of no avail. (z) The acceptance must be made with the consent of the vendor; and if after goods are delivered to a carrier consigned to the vendee, and before any order has been given or act done constituting an acceptance of the goods, the contract is rescinded, no

Valley Ry. Co., 25 U. C. C. P. 275; *Boynton v. Veazie*, 24 Me. 286; *Barkley v. Rensselaer R. R. Co.*, 71 N. Y. 205.

A mere delivery is not enough. *Maxwell v. Brown*, 39 Me. 101; *Denny v. Williams*, 5 Allen, 3; *Gibbs v. Benjamin*, 45 Vt. 124; *Johnson v. Cuttle*, 105 Mass. 449; *Boardman v. Spooner*, 13 Allen, 357; *Prescott v. Locke*, 51 N. H. 94.

But the acceptance need not be simultaneous with the receipt. *Buckingham v. Osborne*, 44 Conn. 133; *Van Woert v. Albany, &c. R. R. Co.*, 67 N. Y. 538; *Bush v. Holmes*, 53 Me. 417; *McKnight v. Dunlop*, 5 N. Y. 537; *Marsh v. Hyde*, 3 Gray, 331; *Richardson v. Squires*, 37 Vt. 640; *Danforth v. Walker*, *ib.* 239; *Thompson v. Alger*, 12 Met. (Mass.) 435; *McCarthy v. Nash*, 14 Minn. 127; *Pinkham v. Mattox*, 53 N. H. 404; *Morse v. Chisholm*, 7 U. C. C. P. 131; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Amson v. Dreher*, 35 Wis. 615.

(y) *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261; *Hodgson v. Le Bret*, 1 Campb. 233; *Kershaw v. Ogden*, 3 H. & C. 717; 34 L. J. Ex. 159.

(z) *Saunders v. Topp*, 4 Exch. 390;

18 L. J. Ex. 374.

subsequent act by the vendee or by his assignees in the event of his bankruptcy will amount to an acceptance, so as to change the property in the goods, without the consent of the vendor. (a)

To constitute an actual receipt as well as an acceptance of the goods, it must appear that the vendor has parted with the possession of the goods, and placed them under the control of the purchaser, so as to put a complete end to all the rights of the unpaid vendor as such. (b) Although, therefore, goods are selected by a purchaser, and ordered to be sent to the residence of the latter, yet if the purchaser refuses to take them in when they arrive, or the vendor gives the person carrying the goods directions not to leave them without receiving the money, and no money is forthcoming, and the goods are not left, there is no actual receipt of them by the purchaser. (c)

Receipt for Inspection and Approval. — When the specific articles have not been selected by the purchaser, there is no acceptance until he has had an opportunity of exercising his judgment with respect to the things sent; for he cannot be made the acceptor of whatever the vendor chooses to send him. (d) If a purchaser sends his servant for goods, and after they have been brought to him, sends them back, there is no acceptance and receipt. And the delivery of the goods into the hands of the intended purchaser, and the unpacking of them by the latter, are not sufficient, if it appears that he has taken them and had them in his possession for no greater time than would reasonably suffice for him to examine the quantity and quality of the goods, and declare his approval or disapproval thereof. (e) Where the defendant gave an oral order for a bale of sponge, which was sent to him in the country by carrier, * and the [* 920] sponge was returned, accompanied by a letter from the defendant, saying he had sent it back, as he did not think it worth the price charged, it was held that there had been no acceptance and receipt of the sponge. (f) Where a pair of ear-

(a) *Smith v. Hudson*, 34 L. J. Q. B. 145; 6 B. & S. 431.

(b) *Cusack v. Robinson*, *supra*.

(c) *Baldey v. Parker*, 2 B. & C. 37; 3 D. & R. 220.

(d) *Hunt v. Hecht*, 8 Exch. 817.

(e) *Curtis v. Fugh*, 10 Q. B. 111; 16 L. J. (N. S.) Q. B. 199; *Jordan v. Norton*, 4 M. & W. 155; *Lucy v. Mouflet*,

5 H. & N. 233; 29 L. J. Ex. 110.

(f) *Kent v. Huskisson*, 3 B. & P. 233, 235.

rings at a sale by auction were knocked down to the defendant and delivered into his hands, but in a few minutes he handed them back and declined the purchase, on the ground that he had been mistaken in the value of the stones with which they were set, it was held that, as by the conditions of sale the defendant had no right to remove the ear-rings until the deposit was paid, the mere delivery of them into his hands the moment he was declared the purchaser was not of itself evidence of an intention to part entirely with the possession of them, and that, consequently, there was not a complete delivery nor an acceptance and actual receipt. (g) And where the purchaser, having inspected a heap of mixed bones, orally agreed to purchase a quantity of ox-bones and cow-bones, to be separated from the heap and sent to a place of deposit indicated by him, and the bones were forwarded there, and the purchaser went and inspected them, and then gave the vendor notice that he did not intend to take them, it was held that there was no acceptance and actual receipt of the bones by the purchaser. (h) But acceptance may be inferred from the goods having been kept an unreasonable time. (i)

Acceptance and Receipt where Goods have been purchased by a Bailee. — Whenever goods are in the hands of a hirer or bailee of them, and an oral bargain is made by him for the purchase of the goods, and the purchaser then takes to the goods as such and changes the character in which he holds them, it is an acceptance as against him, and there will be a binding contract for the purchase of the goods; but if the parol authority to take to the goods as owner, resulting from the oral bargain with the vendor, has been revoked, and the vendor has withdrawn from the bargain, a subsequent taking to the goods by the buyer is unauthorized and tortious, and cannot be an acceptance, which to bind the bargain must be with the assent of the vendor. (k)

Delivery at a Named Wharf or at a railway station, pursuant

(g) *Phillips v. Bistolli*, 3 D. & R. 822; 2 B. & C. 511.

(i) *Coleman v. Gibson*, 1 Mood. & Rob. 168.

(h) *Hunt v. Hecht*, 8 Exch. 814; *Coombs v. Bristol & Exeter Rail. Co.*, 27 L. J. Ex. 402; *Smith v. Hudson*, 6 B. & S. 431; 34 L. J. Q. B. 145.

(k) *Taylor v. Wakefield*, 6 Ell. & Bl. 769.

to the verbal order of the purchaser, is no evidence of an acceptance and actual receipt within the statute. (*l*)

* **Constructive Acceptance.** — There may be a con- [* 921] structive acceptance within the meaning of the statute, manifested by the exercise of acts of domination and ownership over things incapable of manual occupation and transfer from hand to hand. (*m*) If the purchaser sells, or offers to sell, the chattel, or deals with it in a manner which is inconsistent with the right of property and possession being in any one else but himself, his conduct affords evidence of an acceptance and actual receipt of the thing. (*n*) But it has been held that, so long as the vendor retains his right of lien for the price over the *whole* commodity sold, there can be no such acceptance and receipt as the statute requires. Thus where the defendant, being on a visit at the plaintiff's house, orally agreed to purchase a horse of him for forty-five guineas, and the horse was taken out of the stable by his orders, and was mounted, galloped, and leaped both by himself and servant, and was afterward cleaned by the latter, and various things were done to the animal by the defendant's directions, and the defendant then asked the plaintiff to keep the horse for him until he could send for it, and the horse died before it was fetched away, whereupon the defendant refused to pay the price, it was held that there had been no acceptance and receipt of the horse within the meaning of the statute, the plaintiff never having parted with the possession or control of the horse, or lost his lien for the price. (*o*) So where the defendant ordered the plaintiff to make him a wagon, and whilst it was in progress of construction the defendant employed and paid a smith to furnish and affix certain ironwork thereon, and also a tiltmaker to put on a tilt, but the wagon still remained on the premises of the plaintiff, it was held that, as the acts

(*l*) *Hart v. Bush*, 27 L. J. Q. B. 271; 19 L. J. Q. B. 382; *Edan v. Dudfield*, 1 Q. B. 302; but see *Castle v. Sworder*, 1 Q. B. 302; but see *Castle v. Sworder*, 6 H. & N. 832; 30 L. J. Ex. 310.

(*m*) *Williams, J., Bushel v. Wheeler*, 6 H. & N. 832; 30 L. J. Ex. 310.
15 Q. B. 445; *Beaumont v. Brengeri*, 5 C. B. 301; *Parker v. Wallis*, 5 Ell. & Bl. 28; *Currie v. Anderson*, 2 Ell. & Bl. 592; 29 L. J. Q. B. 87.

(*n*) *Morton v. Tibbett*, 15 Q. B. 428; (*o*) *Tempest v. Fitzgerald*, 3 B. & Ald. 684; *Cartea v. Toussaint*, 5 B. & Ald. 875. As to feeding of cattle by the purchaser's servant, see *Holmes v. Hoskins*, 23 Law T. R. Ex. 70.

relied on as acts of ownership were performed before the wagon was finished and capable of delivery, and the wagon afterward remained on the plaintiff's premises to be finished by him, and the latter retained his lien upon it for the price, there had been no acceptance and receipt within the meaning of the statute. (*p*) Where the defendant came to a coppice where some ash-trees were being cut down, and agreed to purchase the timber at so much a foot, and the trees were marked and numbered, and the defendant gave some directions to the workmen as to [* 922] the mode in which they were to be cut, and the * timber was measured, and the measurement communicated to the defendant, who then offered to sell the butts of the trees, declaring it to be his intention to convert the tops into building stuff, it was held that this was no acceptance and receipt of the timber by the defendant within the meaning of the statute, as the vendor had not lost his right of lien over it for the price. (*q*)

Constructive Possession by the Purchaser, and Extinction of the Right of Lien.— Possession of goods and chattels may be given up, and the right of lien extinguished, although the goods are never actually removed from the premises of the vendor; (*r*) and it has been held that, if an oral bargain is made for the purchase of goods, and the purchaser desires the vendor to keep them in his possession for an especial purpose, and the vendor assents thereto, there may be a constructive acceptance and constructive actual receipt, so as to satisfy the words of the statute. In cases of this sort, the question will be whether the vendor had the subject-matter of the sale in his own possession, retaining his right of lien for the price, or whether he had the bare custody of the chattel as the servant of the purchaser, having no possession and no right of lien. (*s*) Where a couple of horses had been sold by a livery-stable keeper at a fixed price, and the

(*p*) *Maberley v. Sheppard*, 3 M. & 205; *Martin v. Reid*, 11 C. B. n. s. 730; Sc. 436; 10 Bing. 99. 31 L. J. C. P. 126.

(*q*) *Smith v. Surman*, 9 B. & C. 561, (*s*) *Castle v. Swarder*, 6 H. & N. 828; 577; 4 M. & R. 455, 470; *Acraman v.* 30 L. J. Ex. 310, overruling *Castle v. Morrice*, 8 C. B. 449; *Bill v. Bament*, 5 H. & N. 285; *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 9 M. & W. 40, 41. 261.

(*r*) *Jacobs v. Latour*, 2 Moo. & P. 261.

purchaser told the vendor that, as he had neither servant nor stable, the vendor must keep the horses at livery for him, whereupon the latter removed them from his *sale*-stable to his *livery*-stable, and there kept them at livery, it was held that this amounted to an actual delivery of the horses, that the vendor had parted with the possession of them, lost his lien for the price, and held the horses only as any other livery-stable keeper might have held them, having the bare custody of the horses, and not the right of possession. (*t*) And where there was an oral bargain for the sale of a horse, and the vendor asked the purchaser to lend him the horse for a few days till he got another, and the purchaser agreed to this, and the vendor kept the horse for a week and then sent it to the purchaser, who refused to receive it or pay for it, it was held that the purchaser by lending the horse to the seller had taken to it as owner, and that the possession of the vendor under the loan was the possession of the purchaser. (*u*)

Acceptance of Bills of Lading, Delivery Orders, and

*** Dock-Warrants.** — The acceptance of a bill of lading of [* 923] goods on board ship *in transitu* to the purchaser is not an acceptance and receipt of the goods, unless the purchaser exercises dominion and ownership over the bill of lading, and deals with it so as to transfer the right of property in the goods to some third party. (*x*) The acceptance and receipt also by a purchaser of a delivery order or dock-warrant is not an acceptance and actual receipt of the goods mentioned or comprised in such order or warrant, until it has been presented to and accepted by the warehouse-keeper or dock-keeper, and the latter has attorned to the purchaser, and consented to hold the goods on his account. (*y*) Before the order or warrant has been presented to and accepted by the warehouse-keeper, it may be countermanded; (*z*) but as soon as it has been presented to and

(*t*) *Elmore v. Stone*, 2 Taunt. 458.

(*u*) *Marvin v. Wallis*, 6 Ell. & Bl. 735; 25 L. J. Q. B. 369.

(*x*) *Meredith v. Meigh*, 2 Ell. & Bl. 368; 22 L. J. Q. B. 403; *Currie v. Anderson*, 2 El. & El. 592; 29 L. J. Q. B. 87.

(*y*) *Bentall v. Burn*, 5 D. & R. 284;

3 B. & C. 423; *Farina v. Home*, 16 M. & W. 119; 16 L. J. Ex. 75.

(*z*) *Lackington v. Atherton*, 7 M. & G. 360; 8 Sc. N. R. 42.

accepted by him, the acceptance, whether made orally or by writing, and whether it is or is not filed in the warehouse, constitutes the warehouse-keeper the agent or trustee of the purchaser, and binds him to hold the goods at the disposal of the latter, and there is then an executed delivery as much as if the goods had been delivered into the purchaser's own hands, or had been removed to his warehouse, and there put under lock and key. (*a*) And although the goods are not at the time of the acceptance of the order in the actual possession of the warehouseman, yet if they afterward come to hand, he is bound to hold them at the disposal of the party in whose favor the order has been made. (*b*) The bailee of the goods cannot, as between himself and the purchaser, after he has once accepted the order, deny the rights of the purchaser, unless the latter has become bankrupt or insolvent before the thing to be delivered has been identified and put into a deliverable state, and the unpaid vendor has interfered to prevent the delivery in the manner presently mentioned. (*c*)

Acceptance and Receipt of Goods by Carriers, Forwarding Agents, and Agents for Custody.¹—The acceptance and receipt of a carrier or wharfinger, or mere forwarding agent, appointed

¹ See *Cross v. O'Donnell*, 44 N. Y. 661; *Johnson v. Cuttle*, 105 Mass. 447; *Rodgers v. Phillips*, 40 N. Y. 519; *Denmead v. Glass*, 30 Ga. 637; *Grimes v. Van Vechten*, 20 Mich. 410; *Jones v. Mechanics' Bank*, 29 Md. 287; *Shepherd v. Pressey*, 32 N. H. 49; *Maxwell v. Brown*, 39 Me. 98; *Frostburg Min. Co. v. New England Glass Co.*, 9 Cush. 115; *Spencer v. Hale*, 30 Vt. 315; *Quintard v. Bacon*, 99 Mass. 185; *Snow v. Warner*, 10 Met. (Mass.) 132; *Atherton v. Newhall*, 123 Mass. 141; *Allard v. Greasert*, 61 N. Y. 1; *Hausman v. Nye*, 62 Ind. 485; *Lloyd v. Wright*, 25 Ga. 215; *Tower v. Tudhope*, 37 U. C. Q. B. 200.

If the bailee on whom an order is drawn accepts it, and agrees to hold the goods on the vendee's account, the possession is thereby changed. *Boardman v. Spooner*, 13 Allen, 357; *Burge v. Cone*, 6 Allen, 412; *Bullard v. Wait*, 16 Gray, 55; *Chase v. Willard*, 57 Me. 157; *Warren v. Milliken*, ib. 97; *Tuxworth v. Moore*, 9 Pick. 347; *Carter v. Willard*, 19 Pick. 1; *Chapman v. Searle*, 3 Pick. 38; *Appleton v. Bancroft*, 10 Met. (Mass.) 231; *Rourke v. Bullens*, 8 Gray, 549; *Linton v. Butz*, 7 Barr, 89; *Wilkes v. Ferris*, 5 Johns. 335; *Hatch v. Lincoln*, 12 Cush. 31; *Hatch v. Bayley*, ib. 27; *Cushing v. Breed*, 14 Allen, 376; *Deady v. Goodenough*, 5 U. C. C. P. 163; *Allan v. Ferguson*, 1 Hannay (N. B.), 149.

(*a*) *Pearson v. Dawson*, Ell. Bl. & Ell. 456; *Harman v. Anderson*, 2 Campb. 242; *Dickenson v. Marrow*, 14 M. & W. 713. (*c*) *Gillett v. Hill*, 2 Cr. & M. 536; 4 Tyr. 290; *Gosling v. Birnie*, 5 Moo. & P. 168; *Stonard v. Dunkin*, 2 Campb. 344.

(*b*) *Holl v. Griffin*, 3 M. & Sc. 732; 10 Bing. 246.

by the purchaser to be the vehicle of transmission to him, are not the acceptance and receipt of the purchaser, (d) unless the latter so deals with the carrier or forwarding agent as to convert him into *an agent for custody holding the goods [* 924] as the purchaser's servant or agent (*post*, p. * 962).

When the purchaser refuses to receive the goods from the carrier, the latter holds them as the agent of the consignor from whom he received them, and there is no acceptance and actual receipt by the purchaser within the meaning of the statute, although the latter has directed the mode of conveyance, and pointed out the particular carrier to be employed. (e) Where, therefore, an *oral* order had been given by the defendant to the plaintiff for two chests of tea to be sent by the usual conveyance, and the tea was shipped on board a vessel which was lost at sea, and the defendant refused to pay the price, it was held that the ship-master was not the defendant's agent for the acceptance and receipt of the tea, and that, as the defendant had not himself accepted and received it, there was nothing to bind the bargain within the statute. (f) And where the defendant gave an *oral* order for cider to be forwarded to his residence, and it was sent there by the wagon, but the defendant refused to take it in, and caused it to be lodged in an adjoining warehouse not belonging to him, where it remained, and no notice was given by the defendant to the vendor of the defendant's intention not to take the cider, it was held that there had been no acceptance and actual receipt of the cider by the defendant. (g) But if a purchaser directs goods to be taken to a place of deposit indicated by him, and they are accordingly sent there, it is the same as if they are sent to his own house. (h) And a purchaser may, by his conduct and course of dealing with the carrier, convert the latter into an agent for custody holding the goods on his, the purchaser's, behalf. (i)

(d) *Smith v. Hudson*, ante, p. * 919.

(g) *Nicholls v. Plume*, 1 C. & P. 272.

(e) *Astey v. Emery*, 4 M. & S. 262;
Norman v. Phillips, 14 M. & W. 277.

(h) *Dodsley v. Varley*, 12 Ad. & E.
 632.

(f) *Hanson v. Armitage*, 5 B. &
 Ald. 557; 1 D. & R. 128; *Meredith v.*
Meigh, 22 L. J. Q. B. 401; 2 Ell. & Bl.
 364; *Hart v. Bush*, Ell. Bl. & Ell. 498.

(i) *Post*, p. * 962; *Bushel v. Wheeler*,
 15 Q. B. 442.

Part Acceptance and Actual Receipt binding the Contract. —

If the defendant receives a portion of the bulk and keeps it, he is responsible in damages for the non-acceptance of the whole of the commodity he agreed to buy. (*k*) But where the acceptance of a part of goods sold is relied upon to take the case out of the statute of frauds, it must be an acceptance of a part of goods bought under one entire contract. Where, therefore, the traveller of a mercantile house received an order in the country from a carpet-manufacturer for a cask of cream of tartar at a fixed price, and also an order for two chests of lac dye, provided they

could be furnished at a given price, and reserved to his [* 925] employers a right * to decline to fulfil the contract for the lac dye at the price named, if they should think fit, and the cream of tartar and the chest of lac dye being forwarded, the manufacturer accepted the cream of tartar, but refused to take the lac dye, it was held that there were two distinct and independent contracts of sale, and that the acceptance of the cream of tartar could not take the contract as to the lac dye out of the operation of the statute. (*l*) Where a purchaser had ordered two dozen of port wine, and the same quantity of sherry, to be returned if not approved, and the vendor sent four dozen of each, and the purchaser kept thirteen bottles and returned the rest, it was held there was no part acceptance of the whole quantity, so as to take the wine returned out of the operation of the statute. (*m*) Generally speaking, however, when a person goes into a shop and buys various different articles at the same time, he does not make as many different contracts as there are articles purchased; (*n*) but there is one contract for the whole, and the acceptance and receipt of any one of the articles so purchased will take the contract as to all of them out of the operation of the statute. Where the traveller of a steel manufacturer at Sheffield took an oral order from an edge-tool maker at Birmingham for thirty-five bundles of common steel at 34s., and five bundles of cast steel at 48s., it was held that this was one entire

(*k*) *Gilliat v. Roberts*, 19 L. J. Ex. 410.

(*l*) *Price v. Lea*, 2 D. & R. 295; 1 B. & C. 158.

(*m*) *Hart v. Mills*, 15 M. & W. 85; 15 L. J. Ex. 200.

(*n*) *Alderson, B.*, 12 M. & W. 38; 3 M. & W. 178; *Baldev v. Parker*, 3 D. & R. 220; 2 B. & C. 37.

contract, and that the acceptance of the common steel took the cast steel out of the operation of the statute. (*o*) But where growing crops were put up to auction in several lots, and separately knocked down to a bidder at separate prices, it was held that there was a distinct contract of sale as to each lot. (*p*)

Where a party under one contract purchases goods ready made, and orders others to be made, an acceptance of the former goods is a sufficient compliance with the statute of frauds and the 9 Geo. IV. c. 14, sect. 7. (*q*) If after a purchase the purchaser draws samples from the bulk of the commodity, this amounts to an acceptance of it. (*r*) Certain sugars in a warehouse were advertised for sale by auction, and samples of half a pound weight from each hogshead, drawn after the sugars had been weighed, were produced to the assembled bidders, and after the biddings were closed, the samples were delivered to and accepted by each purchaser, as part of his purchase, to make up the quantity and * weight of each lot, as specified in the [* 926] catalogue, and it was held that the delivery and acceptance of the sample were an acceptance and receipt of part of the things sold, so as to remove the contract from the operation of the statute. (*s*)

The Acceptance takes the Whole Contract out of the Statute, leaving it open to the Parties to supply the Terms of the Bargain by Oral Evidence. — If, therefore, the contract is made defeasible on certain conditions, the conditions will stand good as part of the contract. Where a mare was sold on the terms that, in case she should prove in foal, she should be returned, together with part of the price, and the mare was delivered and accepted, and afterward proved to be in foal, but the purchaser refused to return her, it was held that the acceptance took the whole agreement out of the statute of frauds, and that the plaintiff might sue the defendant for the refusal to return the mare. (*t*)

(*o*) *Elliott v. Thomas*, 3 M. & W. 176; *Rohde v. Thwaites*, 9 D. & R. 293; *C. B.*, *Scott v. Eastern Counties Railway Company*, 12 M. & W. 38.
6 B. & C. 388; *Bigg v. Whisking*, 14 C. B. 198. (*r*) *Gardner v. Grout*, 2 C. B. n. s. 340.

(*p*) *Roots v. Lord Dormer*, 4 B. & Ad. 77; 1 N. & M. 667. (*s*) *Hinde v. Whitehouse*, 7 East, 570; *Talver v. West*, Holt, 178.

(*q*) *Ante*, p. * 164; *Lord Abinger*, (*t*) *Williams v. Burgess*, 19 Ad. & E.

What is Earnest and Part Payment within the Second Exception of the Statute. — The giving of any quantity of money, however small, by way of earnest or part payment, has the effect of taking the whole contract out of the operation of the statute. It binds the bargain as between the parties, provided the other requisites necessary to the completion of a contract of sale have been duly complied with, and operates as a transfer of the right of property to the purchaser. (*u*) The vendor cannot sell to another until he has requested the vendee to remove the goods and pay the price, and the latter has neglected to comply with the requisition within a reasonable period. (*x*) If there is a bargain for the sale of goods at a certain price, and subsequently an agreement that a debt due from the purchaser shall be wiped off from the amount of the price, and the debt is accordingly released and discharged, this may be equivalent to earnest and part payment. (*y*) The civil law respecting *earnest* provides that, "if earnest has once been given, the sale is perfected, whether the contract be in writing or be made merely by word of mouth." "If the buyer neglects to perform the contract, he loses what he has paid as earnest; and if the seller makes default, he is bound to render to the buyer double the value of what he has received. But the price of the thing sold must always be fixed; for without a price there can be no sale." (*z*)

Transfer of the Right of Property in the Thing sold. —

[* 927] A *contract for the sale of goods, wares, and merchandise, of the value of less than £10, and so not requiring authentication by a signed writing, or duly authenticated in the mode previously pointed out (*ante*, pp. * 164—* 170), may operate as a direct transfer of the ownership and right of property in the thing sold to the purchaser, or may amount only to an agreement for a future transfer, giving the purchaser a right of action against the vendor for a breach of contract, but not effecting any alteration of ownership. When the bargain operates as a trans-

499; *Tomkinson v. Staight*, 17 C. B. 707; 25 L. J. C. P. 85; *Collis v. Botthamley*, 7 W. R. 87. (*x*) *Langford v. Administratrix of Tyler*, 6 Mod. 162.

(*y*) *Walker v. Nussey*, 16 M. & W. 505, 506; 16 L. J. Ex. 120.

(*u*) *Bach v. Owen*, 5 T. R. 409; *Blakey v. Dinsdale*, 2 Cowp. 664. (*z*) Inst. lib. 3, tit. 24; Cod. iv. tit. 38, 40.

fer of ownership, the sale is perfect and complete; when it amounts only to an agreement to procure or manufacture an article of a given character and description, and then transfer it to the purchaser, and does not effect any immediate alteration of ownership, the sale is imperfect and incomplete. A transfer to the purchaser of the right of property in the thing sold is naturally accompanied by a transfer of the risk of loss, so that if between the time of the making of the bargain and the delivery, the thing sold is consumed or destroyed, without any neglect or want of care for its preservation on the part of the vendor, the loss is the loss of the purchaser, and he may be compelled, as we shall presently see, to pay the price, although he can never have the thing for which he agreed to pay it. To constitute a perfect and complete sale, the precise thing sold must be ascertained and identified, except where the sale is of shares and undivided quantities expressly sold as such, and the price must be ascertained and fixed. Personal engagements may subsist between the parties, but there can be no transfer of ownership until such ascertainment and identification have been accomplished. (a)

Where specific and ascertained existing goods and chattels are the subject of a contract of immediate and present sale, and whether there is a warranty of quality or not, the property generally passes to the purchaser upon the completion of the bargain, and the vendor thereupon has a right to recover the price, unless from other circumstances it can be collected that the intention was that the property should not vest in the purchaser. Such an intention is generally shown by the fact of some farther act being first required to be done, such as, for instance, in most cases, delivery — in some cases, actual payment of the price — and in other cases weighing or measuring, in order to ascertain the price, or marking, packing, coopering, filling up casks, or the like. Where there is a warranty of the quality of such specific goods, that circumstance will not prevent the * property in them passing to the purchaser, and if [* 928] it is simply a warranty, will not entitle the purchaser to

(a) As to loss of goods by distress for rent after sale of them, see *Greaves v. Hepke*, 2 B. & Ald. 133.

refuse to accept the goods, or to return them, merely because the warranty is not fulfilled; and in order to entitle the purchaser so to refuse or to return them, it must, in the case of specific goods, be a term of the contract that he shall be at liberty to do so. (b)

In the case of executory contracts, where the goods are not ascertained or may not exist at the time of the contract, from the nature of the transaction no property in the goods can pass to the purchaser by virtue of the contract itself; but where certain goods have been selected and appropriated by the seller, and have been approved of and assented to by the buyer, then the case stands, as to the vesting of the property, very much in the same position as upon a contract for the sale of goods which are ascertained at the time of the bargain. In most cases of such executory contracts something more will generally remain to be done, — as, for instance, selection or appropriation, approval, and delivery of some kind, — before the property would be considered as intended to pass, and upon that taking place, the property will pass, if it was intended to do so, equally as in the case of a contract for specific and ascertained goods. (c)

Imperfect Sales of Unascertained Chattels.¹ — Until the parties are agreed on the specific individual goods, the contract can

¹ Where anything remains to be done to the goods in the way of measuring, testing, or weighing, the American authorities are agreed upon the general rule that the performance of these things constitutes a condition precedent to the passing of the title. But the decisions are not entirely harmonious in their application of this rule, so that reference must be had to the particular State within whose jurisdiction a case falls. The following are important adjudications, —

Alabama: *Leigh v. Mobile, &c. R. R. Co.*, 58 Ala. 165; *McCrae v. Young*, 43 Ala. 622; *Browning v. Hamilton*, 42 Ala. 484.

Arkansas: *Kaufman v. Stone*, 25 Ark. 336; *Jones v. Pearce*, ib. 545.

Illinois: *Burns v. Mays*, 88 Ill. 233; *Gravett v. Mugge*, 89 Ill. 218; *Frost v. Woodruff*, 54 Ill. 155; *Kohl v. Lindley*, 39 Ill. 195.

Indiana: *Lester v. East*, 49 Ind. 588; *Strauss v. Ross*, 25 Ind. 300.

Iowa: *McClung v. Kelley*, 21 Iowa, 508.

Louisiana: *Abat v. Atkinson*, 21 La. Ann. 414.

Maine: *Morrison v. Dingley*, 63 Me. 553; *Dyer v. Libby*, 61 Me. 45; *Chase v. Willard*, 57 Me. 157; *Houdlette v. Tallman*, 14 Me. 400; *Stone v. Peacock*, 35 Me. 385.

Massachusetts: *Foster v. Ropes*, 111 Mass. 10; *Marble v. Moore*, 102 Mass.

(b) *Heilbutt v. Hickson*, L. R. 7 C. P. 438; 41 L. J. C. P. 228.

(c) *Bovill, C. J., Heilbutt v. Hickson*, L. R. 7 C. P. 438; 41 L. J. C. P. 228.

be no more than a contract to supply goods answering a particular description; and since the vendor would fulfil his part of the contract by furnishing any parcel of goods answering that description, and the purchaser could not object to them if they did answer the description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, until it is ascertained which are the very goods sold. (*d*) "Thus," observes Pothier, "in the sale of things which consist in quantity and which are sold by weight, number, or measure, as if one should sell fifty quarters of corn out of a larger bulk in a granary, ten thousand weight of sugar, a hundred carp, &c., the sale is not perfect (so as to vest any right of property in the purchaser) so long as the wheat has not been measured, the sugar weighed, and the fish counted; for up to that time *nondum apparet quid venierit*. It does not sufficiently appear which is

443; Riddle v. Varnum, 20 Pick. 280; Ropes v. Lane, 11 Allen, 591; Mason v. Thompson, 18 Pick. 305; Sumner v. Hamlet, 112 Pick. 82; Arnold v. Delano, 4 Cush. 40; Macomber v. Parker, 13 Pick. 175; Higgins v. Chessman, 9 Pick. 7; Shaw v. Nudd, 8 Pick. 9; Jewett v. Warren, 12 Mass. 300; Morse v. Sherman, 106 Mass. 430; Damon v. Osborn, 1 Pick. 476; Townsend v. Hargraves, 118 Mass. 325.

Michigan: Lingham v. Eggleston, 27 Mich. 324; Whitcomb v. Whitney, 24 Mich. 486; First Nat. Bank v. Crowley, ib. 492; Ortman v. Green, 26 Mich. 209; Adams Min. Co. v. Senter, ib. 73; Begole v. McKenzie, ib. 470; Wilkinson v. Holiday, 33 Mich. 386; Hahn v. Fredericks, 30 Mich. 223.

Missouri: Southwestern Freight Co. v. Stanard, 44 Mo. 71.

New Hampshire: Fuller v. Bean, 34 N. H. 290; Prescott v. Locke, 51 N. H. 94; Gilman v. Hill, 36 N. H. 311; Messer v. Woodman, 22 N. H. 172; Smart v. Batchelder, 57 N. H. 140; Davis v. Hill, 3 N. H. 382; Bailey v. Smith, 43 N. H. 141.

New Jersey: Parker v. Pettit, 43 N. J. L. 512.

New York: Burrows v. Whittaker, 71 N. Y. 291; Hyde v. Lathrop, 2 Abb. App. Dec. 436; Crofoot v. Bennett, 2 N. Y. 260; Terry v. Wheeler, 25 N. Y. 520; Rapelye v. Mackie, 6 Cow. 250; Outwater v. Dodge, 7 Cow. 85; Downer v. Thompson, 2 Hill, 137; Kein v. Tupper, 52 N. Y. 550; Keeler v. Vandewer, 5 Lans. 313; Tyler v. Strong, 21 Barb. 198; Comfort v. Kiersted, 26 Barb. 472; Dexter v. Norton, 55 Barb. 272; Bradley v. Wheeler, 44 N. Y. 495.

Ohio: Ormsby v. Mackie, 20 Ohio St. 295; Woods v. McGee, 7 Ohio, 128.

Vermont: Gibbs v. Benjamin, 45 Vt. 124; Hutchins v. Gilchrist, 23 Vt. 88; Hale v. Huntley, 21 Vt. 147.

See, further, Barrett v. Goddard, 3 Mas. 107; Reynolds v. Ayres, 5 Allen (N. B.) 333; Allingham v. O'Mahoney, 1 Pugs. (N. B.) 326; Harrington v. Cormier, 3 Pugs. 212; Gibson v. McKean, ib. 299; Sprague v. King, 1 Pugs. & B. 241.

(*d*) Blackburn on the Contract of P. C. 116; 11 Jur. 1091; Haseltine v. Sale, 122; White v. Wilks, 5 Taunt. Siggers, 1 Exch. 861; Hale v. Rawson, 178; Logan v. Le Mesurier, 6 Moo. 27 L. J. C. P. 191; 4 C. B. n. s. 85.

the wheat, which the sugar, and which the fish that constitute the object of the sale. . . . The sale is of an unascertained [* 929] subject, and one which cannot be ascertained but by the measuring, the weighing, or the counting. It is not, therefore, until these have been accomplished that the thing sold remains at the risk of the buyer; for risk can only attach on an ascertained subject." (e)

Although the vendor has given a delivery order or a dock-warrant to a warehouse-keeper, wharfinger, or bailee having the custody of the goods, commanding him to deliver them to the purchaser, yet so long as the precise quantity of goods to be delivered under the order has not been identified and ascertained, and separated from the mass of the commodity in bulk, the sale is not perfect and complete, and the right of property is not altered. Thus where a vendor having eighteen tons of Riga flax in mats lying at a wharf, sold ten tons thereof to a purchaser, and gave him a delivery order on the wharfinger for ten tons, which order was accepted by the latter and entered in his books, it was held that the ownership was not altered, nor the right of property transferred from the vendor to the purchaser, until the flax had been weighed and the precise quantity to be delivered under the order had been separated from the bulk and put into a deliverable state, and placed at the disposal of the purchaser. (f) If, however, the bulk of the commodity has been identified, and the sale is a sale of an undivided quantity thereof, expressly sold as such at an ascertained price, the ownership of the share and the risk of the loss of the subject-matter thereof will pass to the purchaser, although the shares have not been separated and divided. (g)

Contracts for the Sale and Manufacture of Goods.¹—Where

¹ But an acceptance of part of the goods will make the contract good for the whole, even though some of them are still to be manufactured. *Ross v. Welch*, 11 Gray, 235; *Marsh v. Hyde*, 3 Gray, 331; *Phelps v. Cutler*, 4 Gray, 137; *Gault v. Brown*, 48 N. H. 183; *Gilman v. Hill*, 36 N. H. 311; *Knight v. Dunlop*, 5 N. Y. 537; *Sloan Saw-Mill, &c. Co. v. Guttshall*, 3 Col. T. 8; *Robinson v. Gordon*, 23 U. C. Q. B. 143.

(e) *Pothier, Contrat de Vente*, No. 179. *v. Nicholson*, 34 L. J. C. P. 273; *Gabarron v. Davis*, 2 M. & S. 403; *ron v. Kreef*, L. R. 10 Ex. 274.
Shepley v. Davie, 5 Taunt. 617; *Moakes* (g) *Post*, p. * 934.

any specific chattel is ordered to be made, the right of property is not vested in the party who gives the order, nor the right to the price in the vendor, until the thing ordered is completed and made ready for delivery, and has been approved of by the purchaser, or some person appointed on his behalf to inspect the materials and workmanship. The builder or maker is not bound to deliver to the purchaser the identical chattel which is in progress, although the purchase-money may have been paid in advance, but may, if he pleases, dispose of it to some other person, and deliver to the purchaser another chattel, provided it answers to the specification or description contained in the contract. (h) But where the contract provides that the article shall be manufactured under the *superintend- [* 930] ence of a person appointed by the purchaser, and also fixes the payment by instalments regulated by particular stages in the progress of the work, the general property in the materials used vests in the purchaser at the time when they are put together under the approval of the superintendent, or, at all events, when the first instalment is paid, subject to the right of the builder to retain the fabric, in order to complete it and earn the rest of the price; and the rights of the parties are then in the same state as if so much of the article as is then constructed had originally belonged to the purchaser, and had been delivered by him to the builder to be added to and finished. (i) And when the article is completed and made ready for delivery, and has been approved of by the purchaser, the general property therein is transferred to the latter, although the chattel may remain in the hands of the builder for the purpose of receiving some subsequent additions and improvements. (k)

There is a great analogy, it has been observed by the civilians, between this description of contract of sale and the contract of letting and hiring of work and labor; and we are told in the

(h) *Atkinson v. Bell*, 8 B. & C. 282; *Read v. Fairbanks*, 22 L. J. C. P. 206; 2 M. & R. 301; *Mucklow v. Mangles*, 13 C. B. 692; *Wood v. Bell*, 6 Ell. & Taunt. 318; *Laidler v. Burlinson*, 2 M. Bl. 361; 5 ib. 772; 25 L. J. Q. B. 148, & W. 615; *Elliott v. Pybus*, 4 M. & Sc. 321. 389; 10 Bing. 512.

(k) *Carruthers v. Payne*, 2 Moo. & P.

(i) *Clarke v. Spence*, 4 Ad. & E. 470; 441; *Wilkins v. Bromhead*, 7 Sc. N. R. Woods v. Russell, 5 B. & Ald. 942; 921.

Digest and in the Institutes how to discriminate between the one and the other. If, it is said, the materials for the work, as well as the work itself, have been furnished by the workman, then the contract is a contract of sale. If, on the other hand, the employer has furnished the materials, and the undertaker of the work contributes his labor merely, the contract is a contract of letting and hiring of labor. Thus, to quote an example from the Roman law, "If Titius should agree with a goldsmith for the making of a certain number of golden rings, of a specified size and weight, for ten *aurei*, the goldsmith to furnish both the gold and workmanship, the contract would be a contract of buying and selling. But if Titius should give his own gold, and agree to pay only for the workmanship, then the contract would be a contract of letting and hiring simply." (l)

Imperfect Sales — Unascertained Price. — Moreover, although the subject-matter of the sale may be ascertained and identified and selected and approved by the purchaser, yet, so long as anything remains to be done, as between the purchaser and vendor, for the purpose of ascertaining the price of the article, [* 931] the right of * property and the risk of loss are not altered. (m) Thus it has been said: "If I sell you all my corn for 12*d.* a bushel, you may not take it before it is measured, whereby the number of the bushels may be known, and also the certainty of the sum which is to be paid for it, so that before the certainty is known, it cannot be adjudged any good contract or agreement." Where a vendor sold the bark stacked at Redbrook at £9 5*s.* per ton of 21 cwt., to be weighed before delivery, and 8 tons 14 cwt. of the bark were weighed and delivered, but before the residue was weighed and the quantity thereof ascertained, a high flood arose and destroyed it, it was held that the right of property in the unweighed residue had not been altered, neither, consequently, had the risk of loss. (n) And where several hundred bales of skins, containing five dozen

(l) Dig. lib. 19, tit. 2, lex 2; Inst. lib. 3, tit. 25, sects. 1, 4; Cod. lib. 4, tit. 65; Lee v. Griffin, 1 B. & S. 272; 30 L. J. Q. B. 252; Atkinson v. Bell, 8 B. & C. 277; Grafton v. Armitage, 2 C. B. 341; 15 L. J. C. P. 20. (m) 2 Wms. Saund. 122, n. (m) ed. 1871. (n) Simmons v. Swift, 8 D. & R. 703; 5 B. & C. 862; Hanson v. Meyer, 6 East, 627.

in each bale, were sold at 57s. 6d. per dozen, and by the usage of trade it was the duty of the seller to count the bales before delivery, to see that each bale contained the number specified, and before any enumeration the skins were destroyed by fire, it was held that the seller must bear the loss. (*o*) So where 1391 pieces of red-pine timber, measuring 50,000 feet, more or less, were sold at the rate of 9½d. per foot, to be measured off before delivery, it was held that, until a measurement had been effected, the sale was not perfect and complete, so as to transfer the ownership and risk. (*p*)

So, observes Pothier, "if the sale is of all the merchandise or corn stored in a particular granary at so much per thousand weight, or so much a quarter, the sale is not considered to be perfect, and the things sold are not at the risk of the buyer, so long as they have not been weighed or measured; for up to that time the quantity has not been ascertained, and the price being determined only by each thousand weight that shall be weighed, or each quarter that shall be measured, there is no ascertained price until the weighing or measuring shall have been accomplished; and the sale, consequently, before that time, is not sufficiently perfected for the risk of the things sold to belong to the buyer; and he ought not to be charged with it until the weighing and measuring have been accomplished." (*q*)

But the distinction must be observed between a sale by measure or weight requiring the measuring or weighing to be accomplished for the purpose of determining and fixing the price, and a sale of specific goods in the lump at an ascertained price, accompanied with a representation or warranty of the weight or quantity, * where the weighing or measuring [* 932] is necessary only for the purpose of satisfying the purchaser that he has got the quantity bargained for. (*r*) The mention of the quantity has no farther effect in this case than to oblige the vendor to make good to the purchaser any deficiency

(*o*) *Zagury v. Furnell*, 2 Campb. 239. 900; *Gilmour v. Supple*, 11 Moore, 1091.
 (*p*) *Logan v. Le Mesurier*, 11 Jur. P. C. 571; *Furley v. Bates*, 33 L. J. Ex. 43; s. c. nom. *Turley v. Bates*, 2 H. & C. 200; *Kershaw v. Ogden*, 3 H. & C. 717; 34 L. J. Ex. 159.
 (*q*) Pothier, *Contr. de Vente*, No. 309; Dig. lib. 18, tit. 1, lex 35.
 (*r*) *Swanwick v. Sothorn*, 9 Ad. & E.

that may be found to exist. (*s*) Moreover, if it appears by the terms of the contract that it was the intention of the parties that the property should pass to the buyer, it will pass, although the goods have still to be weighed, measured, or tested, provided the subject-matter of the sale is ascertained and identified; (*t*) and there may be a complete contract, so as to pass the property in the goods, although the price has not been definitely agreed on, (*u*) or although the goods are still unfinished (*x*) or unweighed. (*y*)

When the quantity is ascertained, the mere omission to add up the total contents according to weight or measure will not prevent the right of property and the risk from passing to the purchaser. (*z*) If certain specific cases, bales, or packages of goods are sold in the lump, at the customary and reasonable price paid for such articles, the price is sufficiently ascertained, and the right of property will pass, although no definite sum has been agreed upon, and the time or mode of payment has not been specified. (*a*)

Perfect Sales operating as Transfers of the Ownership and Risk.¹ — When the subject-matter of the sale is ascertained and identified at the time the bargain is struck, and the price is likewise agreed upon and reduced to a certainty, the sale is a perfect and complete sale from the time of the making of the bargain, and the right of property in the thing sold and the risk of loss are transferred to the purchaser, although the right of possession may continue in the vendor until the purchase-money has been paid or tendered. (*b*) Where the goods are by arrange-

¹ Where purchaser ordered goods, directing that they should not be shipped until a certain time, and the seller sent them earlier, and they were lost at sea, — *held*, that the risk was on the seller. *Tascott v. Rosenthal*, 10 Ill. App. 639.

(*s*) Pothier, *Vente*, No. 310.

(*z*) *Tansley v. Turner*, 2 Sc. 241; 5

(*t*) *Turley v. Bates*, 2 H. & C. 200; s. o. nom. *Furley v. Bates*, 33 L. J. Ex. 43; *Martineau v. Kitching*, L. R. 7 Q. B. 436; 41 L. J. Q. B. 227.

Bing. N. C. 151.

(*u*) *Joyce v. Swann*, 17 C. B. n. s. 84.

(*a*) *Valpy v. Gibson*, 4 C. B. 837; 16 L. J. C. P. 248; *Joyce v. Swann*, 17 C. B. n. s. 102; *Hoadley v. MacLaine*, 10 Bing. 482; 4 M. & Sc. 340.

(*x*) *Young v. Matthews*, L. R. 2 C. P. 127; 36 L. J. C. P. 61.

(*b*) *Bloxam v. Saunders*, 4 B. & C. 948; 7 D. & R. 405; *Knight v. Hopper*, Skin. 647. "Si id quod venierit appareat, quid, quale, quantum, sit et pre-

(*y*) *Martineau v. Kitching*, L. R. 7 Q. B. 436; 41 L. J. Q. B. 227.

ment left with the vendors as warehousemen, and no actual delivery has been made to the purchaser, the vendor's lien revives upon the insolvency of the purchaser as against his assignees. (c) * Where the vendor agreed to sell, [* 933] and the purchaser to buy, "a stack of hay standing in Canonbury Field, Islington, at the sum of £145, the hay to be allowed to stand on the premises until the first of May next and not to be cut till paid for," it was held that there was an immediate transfer of the right of property to the purchaser, and the hay having been accidentally destroyed by fire whilst it remained in the possession of the vendor, that the purchaser must bear the loss. "If," observes Pothier, "things have been sold *per aversionem*, that is to say, in the mass for a fixed price, the sale is complete from the time of the making of the contract, and the thing sold remains at the risk of the purchaser, although it has not yet been delivered to him, so that if between the bargain and delivery it should happen to perish without the fault of the seller, the latter becomes released from his obligation to deliver, but the buyer is not, on account thereof, released from his obligation to pay the contract price." (d) And where a crop of potatoes off a specified field was sold (although the crop was not then sown), and the crop failed, it was held that the seller was not liable for damages. (e)

Selection and Appropriation of Goods to the Use of the Purchaser.¹—If the commodity was selected in the bulk by the

¹ The American decisions are not altogether harmonious. Compare, as leading cases, in the courts of the various States, *Kimberley v. Patchin*, 19 N. Y. 330; *Scudder v. Worster*, 11 Cush. 573; *Chapman v. Shepard*, 39 Conn. 413; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Indianapolis Ry. Co. v. Maguire*, 62 Ind. 140; *Smyth v. Ward*, 46 Iowa, 339; *Waldron v. Chase*, 37 Me. 414; *Warren v. Buckminster*, 24 N. H. 336; *Hurff v. Hires*, 40 N. J. L. 581; *Waldo v. Belcher*, 11 Ired. L. 609; *Hutchinson v. Hunter*, 7 Pa. St. 140; *Ferguson v. Louisville City Nat. Bank*, 14 Bush, 555; *Pleasants v. Pendleton*, 6 Rand. 473. See, further, *Smart v. Batchelder*, 57 N. H. 140; *Kein v. Tupper*, 52 N. Y. 550; *Foot v. Marsh*, 51 N. Y. 288;

tium; et pure venit, perfecta, est emptio." 307, 308; *Tarling v. Baxter*, 9 D. & R. 272; 6 B. & C. 360; *Taylor v. Caldwell*, 3 B. & S. 837; 32 L. J. Q. B. 164.

(c) *Grice v. Richardson*, 3 Ap. Cas. 319. (e) *Howell v. Coupland*, *post*, p. *1197.

(d) Pothier, *Contrat de Vente*, Nos.

purchaser, the ownership and risk pass as soon as the quantity sold has been separated from the mass and tendered to the purchaser, or placed at his disposal. Thus where a quantity of turpentine was sold by auction at a fixed price per hundred-weight, to be delivered in casks, and taken at the net weight printed in the catalogue, the casks to be filled up by the vendor and removed by the purchaser, and all the casks were filled up except ten, and were placed in the vendor's warehouse at the disposal of the purchaser, and before they were removed the whole quantity was consumed by fire, it was held that the right of property in the casks that had been filled up and placed at the disposal of the purchaser had passed to the latter, and that he must stand to the loss; but as to the remaining quantity, which had not been selected and weighed and made ready for delivery, that it continued in the vendor and at his risk. (*f*) And the right of property and the attendant risk may be transferred by the buyer to a third party by another contract of sale, although the price may not have been paid and the [* 934] right of possession *divested out of the original vendor. (*g*) If the bulk of the commodity or the specific article bought and sold has not been selected by the purchaser and identified in the first instance, the sale may be rendered perfect and complete, so as to operate as a transfer of the property and risk, by a subsequent selection by the vendor and

Cumberland Bone Co. v. Andes Ins. Co., 64 Me. 466; *Morrison v. Dingley*, 63 Me. 553; *Woods v. McGee*, 7 Ohio, 466; *Southwell v. Beezley*, 5 Oreg. 143; *Warren v. Milliken*, 57 Me. 97; *Cushing v. Breed*, 14 Allen, 380; *Hall v. Boston, &c. R. R. Co.*, ib. 439; *Ropes v. Lane*, 9 Allen, 502; *Golder v. Ogden*, 15 Pa. St. 528; *Merrill v. Hunnewell*, 13 Pick. 215; *Bailey v. Smith*, 43 N. H. 141; *Bell v. Farrar*, 41 Ill. 400; *Morrison v. Woodley*, 84 Ill. 192; *Stephens v. Tucker*, 55 Ga. 543; *Messer v. Woodman*, 22 N. H. 172; *Rodee v. Wade*, 47 Barb. 63; *Tompkins v. Tibbits*, 1 Hannay (N. B.), 317; *Polluck v. Fisher*, 1 Allen (N. B.), 515; *Rigney v. Mitchell*, 2 U. C. C. P. 266; *O'Neil v. McIlmoyle*, 34 U. C. Q. B. 236; *Robertson v. Strickland*, 28 U. C. Q. B. 221; *Middlebrook v. Thompson*, 19 U. C. Q. B. 307; *McDougall v. Elliott*, 20 U. C. Q. B. 299; *Cox v. Jones*, 24 U. C. Q. B. 81; *Levy v. Loundes*, 2 Low. C. 257; *Pew v. Laurence*, 27 U. C. C. P. 402.

(*f*) *Rugg v. Minett*, 11 East, 210; *Blackburn on the Contract of Sale*, Aldridge v. Johnson, 7 Ell. & Bl. 899; p. 128.
 26 L. J. Q. B. 206; 28 L. J. Q. B. 252; (*g*) *Scott v. England*, 14 L. J. Q. B. Langton v. Higgins, 4 H. & N. 402; 43.
Langton v. Waring, 18 C. B. n. s. 315;

approval thereof by the purchaser, such subsequent selection and approval being the same as if the article had been fixed upon in the first instance; (*h*) but a selection by the vendor only, without the approval of the purchaser, will not transfer the property in the goods so selected. (*i*) If the article is to be selected by the vendor, but the purchaser makes its acceptance dependent upon his approval of it as regards workmanship, convenience, or taste, the latter will be entitled to reject it, if it does not meet his approval upon some one or more of the grounds stated. (*k*)

Delivery to Carriers.¹ — If the vendor is authorized and empowered to select the goods and forward them to the purchaser, the selection by the vendor, and the delivery of the goods to a carrier to be conveyed to the purchaser, will have the effect of transferring the ownership and risk to such purchaser, provided there is a binding contract by note in writing, by part payment, or by part acceptance, and the selection is made according to the orders or authority given. (*l*) As soon as the goods are delivered into the hands of the carrier, in execution and fulfilment of a properly authenticated contract of sale (*ante*, p. * 164), the carrier becomes responsible to the purchaser to whom they are consigned, and there is an executed delivery, as we shall presently see, as well as a transfer of the ownership and risk; (*m*) but if by the terms of the contract the delivery of the goods at their place of destination is made a condition precedent to the payment of the price, and the goods perish in the hands of the carrier, the vendor is not entitled to the price. (*n*) And if

¹ See *post*, p. * 950.

(*h*) *Rhodes v. Thwaites*, 6 B. & C. 388; *Sparkes v. Marshall*, 3 Sc. 185; 2 Bing. N. C. 775; *Campbell v. Mersey Docks*, 14 C. B. n. s. 412.
 (*i*) *Jenner v. Smith*, L. R. 4 C. P. 270.
 (*k*) *Andrews v. Belfield*, 2 C. B. n. s. 789; *Lucy v. Moufflet*, 5 H. & N. 229; 29 L. J. Ex. 110.
 (*l*) *Fragano v. Long*, 4 B. & C. 221; *Browne v. Hare*, 4 H. & N. 830; 29 L. J. Ex. 6.
 (*m*) *Anderson v. Clark*, 2 Bing. 20; *Bryans v. Nix*, 4 M. & W. 791, 793; *Swain v. Shepherd*, 1 Mood. & Rob. 223; *Wiltshire Iron Co., In re*, L. R. 3 Ch. 443; 37 L. J. Ch. 554.
 (*n*) *Ld. Cottenham, Dunlop v. Lambert*, 6 Cl. & Fin. 621; *Calcutta, &c. Steam Navigation Company v. De Mattos*, 32 L. J. Q. B. 322; 33 L. J. Q. B. 214.

the purchaser's right to possession of the goods is made conditional on the prior performance of some act on his part, such as an acceptance of a bill of exchange, or the giving of a promissory note for the price, the vendor may stop the goods *in* [*935] *transitu*, and resume the possession * of them, if the purchaser neglects to fulfil the condition at the time appointed. (o)

Delivery under a Bill of Lading (see *post*, p. *966) — **Transfer by Bill of Lading.**¹ — Where goods are consigned to a merchant abroad under a bill of lading expressing that the goods are shipped by order and on account of the consignee, the property vests in the consignee from the time they are put on board. (p) But if goods are delivered to a ship-master to be carried under a bill of lading, whereby the latter undertakes to carry them for and on account of the vendor, and deliver them to the vendor at the port of destination, or to the assignee of the bill of lading, there is no transfer of the property until the bill of lading has been indorsed to the purchaser, (q) unless from all the facts it may fairly be inferred that it was the intention of the seller that the property in the goods should pass. (r) So where a shipper

¹ Where a draft against an invoice of goods is forwarded to the buyer for acceptance, together with the bill of lading, he cannot rightfully retain the bill of lading or the goods therein named, unless he accepts the draft. *Cobb v. Illinois Central R. R. Co.*, 88 Ill. 394; *Taylor v. Turner*, 87 Ill. 296; *First Nat. Bank v. Crocker*, 111 Mass. 163; *Fifth Nat. Bank v. Bayley*, 115 Mass. 228; *Alderman v. Eastern R. R. Co.*, ib. 233; *First Nat. Bank v. Dearborn*, ib. 222; *Marine Bank v. Wright*, 48 N. Y. 1; *Bank of Rochester v. Jones*, 4 N. Y. 497; *Winter v. Coit*, 7 N. Y. 288.

Where the consignment is made as security for previous advances, the consignee may acquire a special property in the goods on receiving the bill of lading, or even on the delivery to the carrier. *Grosvenor v. Phillips*, 2 Hill (N. Y.) 147; *Bailey v. Hudson River R. R. Co.*, 49 N. Y. 70; *Nelson v. Chicago, &c. R. R. Co.*, 2 Ill. App. 180; *Straus v. Wessel*, 30 Ohio St. 211; *Schumacher v. Ely*, 24 Pa. St. 521. But in cases where the consignee is only a general creditor, there is a recognized distinction. See authorities just cited, and also *Redd v. Burrus*, 58 Ga. 574; *Hodges v. Kimball*, 49 Iowa, 577; *Saunders v. Bartlett*, 12 Heisk. 316; *Oliver v. Moore*, ib. 482; *Elliot v. Bradley*, 23 Vt. 217.

(o) *Com. Dig. Condition* (B 13); (q) *Wait v. Baker*, 2 Exch. 1; 17 L. Brandt v. Bowlby, 2 B. & Ad. 932; *J. Ex. 307*; *Jenkyns v. Brown*, 14 Q. B. Moakes v. Nicholson, 19 C. B. n. s. 290; 503.

34 L. J. C. P. 273.

(r) *Joyce v. Swann*, 17 C. B. n. s. 84.

(p) *Brown v. Hodgson*, 2 Campb. 35; *Coxe v. Harden*, 4 East, 211.

takes and keeps in his own or his agent's hands a bill of lading making the goods deliverable to his order, to protect himself, this is effectual until all conditions are fulfilled by the consignee, or at least until he offers to fulfil the conditions and demands the bill of lading. The vendor retains not only a lien, but a power to dispose of the goods, so long as the vendee continues in default. (*s*) But if the bill of lading is only dealt with to secure the contract price, then on payment or tender the goods vest in the purchaser. (*t*) Where goods destined for a foreign port are put on board ship, and the bill of lading and policy of insurance are handed over in exchange for a part payment, the property and risk in the goods forthwith vest in the purchaser. (*u*)

Undivided Shares. — If things of quantity, such as corn, coals, &c., are laden on board a vessel, and the ship-master is directed to deliver certain ascertained but undivided quantities to different consignees, the latter have a right, as against the carrier, to the due conveyance and delivery of their several undivided shares of the cargo, although no right of property in any specific measures of corn or coal can pass to them until the cargo has been divided and their several shares set apart for them and identified. In cases of this kind, the goods are at the risk of the purchasers; and if the vessel is lost by perils of the sea, and the whole cargo destroyed, they must bear their several proportions of the loss, * according to their several shares [* 936] in the cargo, although those shares were undivided. In these cases, they have a right of property in an undivided share, but not in any specific ascertained portion of the cargo. (*v*)

When everything that the seller is to do to complete the sale has been performed, the property and the attendant risk pass to the purchaser, although the latter may not have got the right of possession of the subject-matter of the sale, or perfect control over it, by reason of the non-performance of some act to be done exclusively by him, such as procuring wines and spirits to be gauged by a custom-house officer, in order to ascertain their

(*s*) *Ogg v. Shuter*, 1 C. P. D. 47, C. A.

(*t*) *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164, C. A.

(*u*) *Tregelles v. Sewell*, 7 H. & N. 574.

(*v*) *Jenkyns v. Usborne*, 7 M. & Gr. 698.

strength, preparatory to the calculation of the duty, payment of the duty when calculated and ascertained, or the non-performance of any other act which it is incumbent on the buyer alone to perform. (x) But it is not competent to the buyer to perfect the contract and vest the property in himself by the performance of acts which it is the duty of the vendor to perform, unless the acts are done with the sanction and by the authority of the vendor. (y)

Conditional Sale.¹—A contract for the sale of goods "on arrival," (z) or that may arrive, or be shipped, or loaded, (a) or expected to arrive, (b) is conditional on the arrival or shipping of the goods, so that if no goods arrive or are shipped, there is no sale, and no liability to deliver on the part of the vendor; but if a man takes upon himself to sell goods expected to arrive by a certain ship, and the goods afterward arrive consigned to some third party, so that the intended vendor has no power of disposing of them, he is precluded from setting up that, in addition to the contingency of their arrival, there was implied the farther contingency of their coming consigned to him. Having dealt with them as his own, he cannot be allowed to import into the contract a new condition, viz., that the goods on their arrival shall prove to be his; (c) for whenever the agreement is conditioned upon an event which happens, the vendor will be liable for non-performance, although he is prevented from fulfilling his contract by reason of some mistake or accident over which he had no control; for he ought to have provided against the possible contingency by his contract. If, therefore, he

¹ See *post*, p. *989, respecting sales "to arrive;" *Smith v. Pettee*, 70 N. Y. 13; *Benedict v. Fields*, 16 N. Y. 597; *Reimers v. Kidner*, 2 Robt. 11; *Shields v. Pettee*, 2 Sandf. 262; *Neldon v. Smith*, 36 N. J. L. 148. On liability of carrier for loss of goods sold "to arrive," see *The Carlotta*, 9 Ben. 1.

(x) *Rugg v. Minett*, 11 East, 210; (a) *Hayward v. Scougall*, ib. 56; *Studdy v. Saunders*, 8 D. & R. 403; *Lovatt v. Hamilton*, 5 M. & W. 639.

Hinde v. Whitehouse, 7 East, 558; *Furley v. Bates*, 2 H. & C. 200; 33 L. J. Ex. 429; ib. 7 Q. B. 139; 39 L. J. Q. B. 43; *Sweeting v. Turner*, L. R. 7 Q. B. 210; 41 ib. 91.

310; 41 L. J. Q. B. 58. (c) *Fischel v. Scott*, 15 C. B. 69;

(y) *Acraman v. Morrice*, 8 C. B. 459; *Gorissen v. Perrin*, 2 C. B. n. s. 701; 19 L. J. C. P. 57. 27 L. J. C. P. 29.

(z) *Boyd v. Siffkin*, 2 Campb. 325.

agrees to sell certain cases of East * Indian tallow to be [*937] delivered to the purchaser on the safe arrival of a certain ship, and the ship arrives, but without the tallow, the vendor is responsible for the non-performance of his contract. (d) Where the plaintiff sold to the defendant a certain unascertained quantity of oil, part of a large quantity lying at the plaintiff's wharfinger's, and sent an order to the wharfinger to transfer the oil to the defendant, and the wharfinger made the transfer in his books to the defendant, and gave the plaintiff's clerk a paper acknowledging the transfer, and the clerk went with this paper to the defendant's counting-house and demanded a cheque in payment, and was refused, but the defendant took and retained the paper, and sent to the wharfinger and obtained possession of the oil, it was held that, as there was no intention to part with the paper or the property in the goods without payment, there was no change of property in the goods in the hands of the wharfinger, and that the plaintiff was entitled to recover the oil or the value of it from the defendant. (e)

Implied Promises and Undertakings resulting from Executory Contracts of Sale. — Although a bargain and sale may be so far incomplete and imperfect as not to operate as an immediate transfer of property, yet the engagements which naturally result from the contract are in existence as soon as it has been entered into. There is an implied promise or undertaking on the part of the vendor to put the vendee into possession of the thing sold without delay, if the contract makes no mention of the time of delivery, and a promise or undertaking by the vendee to accept the goods and pay the price on the delivery of the subject-matter of the sale by the vendor. There is also an implied undertaking on the part of the vendor of a specific chattel to be delivered at a future day, to take the same care of it as of a thing borrowed for his own use (*ante*, c. 1); and if he wastes or resells the property, he is responsible in damages to the purchaser. (f)

When the Sale is a Sale of Particular Classes and Descriptions of Goods to be selected by the vendor, such as a sale of so

(d) *Hale v. Rawson*, 4 C. B. n. s. 85; 27 L. J. C. P. 189.

(e) *Godts v. Rose*, 17 C. B. 229; 25 L. J. C. P. 64.

(f) *Chinery v. Viall*, 5 H. & N. 293; 29 L. J. Ex. 180.

many measures of corn, wine, oil, or fruit, and not of any specific ascertained parcel of goods, the vendor will fulfil his contract by furnishing any goods fairly answering the description given by him. When, on the other hand, the precise article intended to be bought and sold was ascertained and identified at the time of the making of the bargain, the vendor must deliver the identical thing so fixed upon and ascertained, and cannot fulfil [*938] his contract by *tendering or delivering anything else of a corresponding nature. If the purchaser, instead of going in person to a shop and selecting the goods himself, sends an order describing what he wants, the vendor, if he accepts the order, must select and send an article which fairly corresponds with the description. Thus, where a purchaser forwarded a written order to the vendor for "scarlet cuttings" to be shipped on his account for the Chinese market, and the vendor sent on board a different article, it was held that the plaintiff was entitled to recover from the vendor all the loss he had sustained in consequence of his not having had in China the goods which he had ordered. (*g*) So where the purchaser sent an order in writing for "seventy-five barrels of best pork, branded Scott and Co.," a description of pork well known in the market as cured by Scott and Co., and paid the ordinary price for the article, and the vendor sent an inferior commodity, cured by another person, it was held that the vendor was responsible in damages for having sent a different article. (*h*) And where one vendor had contracted to sell Skirving's Swede turnip-seed, and another foreign refined rape-oil, it was held that they were responsible in damages for sending seed and oil which did not answer the description given. (*i*) If, therefore, a shipowner supplies a ship ordered to be copper-fastened which is not copper-fastened, or if a diamond-merchant sells a piece of cut glass or crystal for a diamond, or a silversmith sells plated goods for silver, or if a merchant sells wine or beer described as "fit," or ordered by the purchaser to be "fit, for the Mediterranean" or "India market," and

(*g*) *Bridge v. Wain*, 1 Stark. 504; *Nichol v. Godts*, 10 Exch. 191; *Simond Gardiner v. Gray*, 4 Campb. 144. *v. Braddon*, 2 C. B. n. s. 336; 26 L. J.

(*h*) *Powell v. Horton*, 3 Sc. 110; 2 C. P. 198; *Wheler v. Schilizzi*, 17 C. B. 619. Bing. N. C. 668.

(*i*) *Allan v. Lake*, 18 Q. B. 567;

sends out a liquid which turns sour on the voyage, and is not salable on its arrival as wine or beer, he is liable to an action for the breach of an implied undertaking to furnish the article described and ordered. (*k*)

Mercantile Usage.—Where a contract was entered into for the supply of a certain quantity of “best palm oil, usual tare and draft, wet, dirty, and inferior, if any, at a fair allowance,” it was held that evidence was admissible to show that there was an established usage in the trade regulating the proportions of good and bad oil, and that the vendor under such a contract was bound to supply a certain proportion of the best oil. (*l*)

Time of Performance.—By the Judicature Act, 1873, sect. 25 (7), “Stipulations in contracts as to time or otherwise which would *not before the passing of this act have [* 939] been deemed to be or to have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity.” If the sale is a sale of things of quantity generally, and no right of property in the things agreed to be sold passes by the bargain from the vendor to the purchaser, time will in general be of the essence of the contract, so long as the contract remains executory, and the purchaser will not be bound to accept and pay for the goods if they are not tendered on the day specified; (*m*) but if the sale is a perfect and complete sale of specific ascertained chattels, and the ownership and right of property in the thing sold have been transferred by the bargain to the purchaser, time is not of the essence of the contract, and the vendor cannot repudiate the sale and revest the right of property in himself, and refuse to deliver the goods at a subsequent period on tender of the price, on the ground of the non-payment thereof at the time appointed, (*n*) unless the sale has been made conditional on payment at the time named. When different times are not expressly appointed for payment

(*k*) *Fisher v. Samuda*, 1 Campb. 189; (*m*) *Gath v. Lees*, 3 H. & C. 558.
Shepherd v. Kain, 5 B. & Ald. 240; (*n*) *Martindale v. Smith*, 1 Q. B.
Tye v. Finmore, 3 Campb. 461. As to im- 395; *Wilmshurst v. Bowker*, 8 Sc. N. R.
 plied warranties, see *post*, pp. *970 *et seq.* 571; 7 M. & Gr. 882; *Chinery v. Viall*,
 (*l*) *Lucas v. Bristow*, 27 L. J. Q. B. 5 H. & N. 293; 29 L. J. Ex. 180.

and delivery, the acts of payment and delivery are, as we have seen, concurrent, and constitute mutual conditions to be performed at the same time; (*o*) but if a precise time has been appointed for the payment of the price, and another and different time is fixed for the delivery, the acts are not concurrent, and do not constitute mutual conditions, (*p*) unless they are made so by custom and usage of trade. (*q*) If it appears to have been the intention of the parties that the sale should be void, and the right of property in the thing sold reverted in the vendor, in case of the non-payment of the purchase-money or the non-delivery of the goods on an appointed day, this does not enable the purchaser to say, "I am not ready with my money, therefore I will avoid the contract," nor the vendor to say, "I am not ready to deliver, therefore I will be off the bargain."

If the time appointed for delivery or payment is not of the essence of the contract, the delivery and payment must be made within a reasonable time after notice and request of performance; and if no time at all has been appointed for the performance of these acts, the vendor is bound to deliver within a reasonable period after request and tender of the price, and the purchaser must in like manner accept the goods and pay for them [* 940] on * delivery, or offer of delivery, being made by the vendor; and if the contract is not sought to be carried into effect within a reasonable period, either on the part of the vendor or the purchaser it is deemed to be dissolved and abandoned by mutual consent. (*r*)

When a particular day is appointed for the delivery of the goods or the payment of the price, the party has the whole of the day, and if one of several days, the whole of those days, for the performance on his part of the contract; but he must do all he can to make the payment or perform the act at a convenient hour before midnight. Therefore if he is to pay a sum of money, he must tender it a sufficient time before midnight, for the party

(*o*) *Callonel v. Briggs*, 1 Salk. 113; (*q*) *Field v. Lelean*, 30 L. J. Ex. 168.
Lock v. Wright, 1 Str. 571; 8 Mod. 41; (*r*) *Ellis v. Thompson*, 3 M. & W.
Withers v. Reynolds, 2 B. & Ad. 882; 457; *Langfort v. Tiler*, 1 Salk. 113;
Atkinson v. Smith, 14 M. & W. 695. *Domat (Sale)*, L. 1; *Lanyon v. Too-*
(*p*) *Ante*, p. * 893; *Thorpe v. Thorpe*, good, 13 M. & W. 27.
1 Salk. 171; 1 Raym. 665.

to receive it. If he is to deliver goods, he must deliver them in sufficient time for examination and receipt. If the payment or delivery is to be performed at a certain place on a specific day, the tender must be to the other party at that place; and, as the attendance of the other is necessary at that place to complete the act, the law, though it requires the other to be present, does not require him to be present through the whole day; and, therefore, it fixes a particular part of the day; and it is enough if he is at the place a convenient time before sunset, so that the act may be completed; and if the party who is to perform tenders to the party present, or if absent, if the tender is made before sunset, that is sufficient. (*s*) Orders for goods to be delivered as soon as possible do not oblige the vendor who accepts the order to put everything else aside and execute it without any delay at all. He is only bound to execute the order within a reasonable time. (*t*)

Enlargement of the Time of Performance.—The time appointed for the performance of a contract of sale required by the statute of frauds to be in writing, cannot be extended by an oral agreement, so as to enable a party to sue partly upon the written contract and partly upon the subsequent oral agreement. (*u*)

Non-Delivery of Goods sold.—If the contract is entire for the purchase of a certain quantity of goods, the vendor cannot be compelled to deliver a part only of the goods; and if the purchaser declines to take the whole quantity he has ordered, the vendor may at once abandon the contract or sue for damages. (*x*) If the ownership and right of property in the thing sold pass by the bargain to the purchaser, the vendor is not, as we have already * seen, released from his obligation to deliver the goods by reason of the non-payment of the price at the time appointed, unless the acts of payment and delivery have been made concurrent acts, and the sale is made conditional on the payment of the purchase-money by an appointed period. If goods which have become the property of

(*s*) *Startup v. Macdonald*, 7 Sc. N. R. 297; 12 L. J. Ex. 483; *post*, pp. * 1190, * 1194.

(*t*) *Attwood v. Emery*, 1 C. B. N. S. 114; 26 L. J. C. P. 73.

(*u*) *Marshall v. Lynn*, 6 M. & W. 109; *Stead v. Dawber*, 10 Ad. & E. 57, overruling *Cuff v. Penn*, 1 M. & S. 27.

(*x*) *Kingdom v. Cox*, 5 C. B. 522.

the purchaser by bargain are to be delivered at a future day, and before the day the vendor sells and delivers them to another, he is immediately liable to an action for damages at the suit of the first purchaser. (y) If the goods are to be delivered "forthwith," and the price is to be paid in a "fortnight" or "month," the delivery must be made without delay. (z) If a bought note specifies that certain goods have been "bought to be paid for by cash in one month," the buyer is entitled to call for delivery at any reasonable time from the making of the contract; but the vendor has no right to the money until the month has expired, unless a usage of trade authorizing the vendor to keep possession of the goods until the day of payment arrives, can be established. (a)

If the goods are in the hands of a warehouse-keeper, wharfin-ger, or other agent, for safe custody, and are to be fetched away by the purchaser, and the goods are weighed and set apart for the purchaser, and the agent consents to hold them at the disposal of the latter, there is, as we have seen, a sufficient delivery on the part of the vendor; and if the goods are improperly taken away by a third party, the vendor cannot then be sued for the non-delivery of them. (b) Where by the terms of the contract the goods were to be taken away at the purchaser's expense in fourteen days from the day of the sale, and the purchase-money was to be paid on or before the delivery of the goods, it was held that the seller was bound to deliver when called upon at any time during the fourteen days, and had not fourteen days to deliver the goods, although the purchaser had fourteen days to take them away. (c) If goods are sold upon credit, upon the terms of immediate delivery and payment at a future day, and the purchaser suffers the vendor to retain possession until the period of credit has expired, and the money is not then paid, it has been said that the vendor's lien for the price revives, and that he will not then be bound to deliver the goods until he has received payment of the price. (d) If the purchaser has the

(y) *Bowdell v. Parsons*, 10 East, 359; *Hochester v. De La Tour*, 2 Ell. & Bl. 688; *ante*, pp. *1189, *1196.

(z) *Stanton v. Wood*, 16 Q. B. 638. (a) *Field v. Lelean*, *ante*, p. *939.

(b) *Wood v. Tassell*, 6 Q. B. 234.

(c) *Hagedorn v. Laing*, 6 Taunt. 166.

(d) *New v. Swain*, 1 Dans. & Ll.

193. But see *Parsons on Contracts*, p. 441; *Blackburn on the Contract of*

option of paying either by bill or cash, and he fails to
 give or tender a bill, he will be deemed to have made [942]
 his election to pay cash. (e)

Some auctioneers sold two ricks of hay which had been distrained by a landlord for rent. By the conditions of sale, the hay was to be removed by the purchaser, and the time specified for its removal being considered too short, the tenant gave a written permission for the hay to remain on the land for a longer period. The price of the hay was paid at the time of the sale, and a few days afterward the purchaser received from the auctioneers a written order, addressed to the tenant, requiring him to permit the purchaser to remove the hay; but the tenant then refused, and would not suffer him to come upon the land to take it. The purchaser then brought an action against the defendants for the non-delivery; and the defendants pleaded that they did deliver possession to the plaintiff; and it was held that this plea was supported by the facts; that the permission given by the tenant for the hay to remain on the land for the convenience of the purchaser amounted to an attornment from the tenant to the purchaser, and was equivalent to an express undertaking on the part of the tenant to hold the hay for the purchaser's use and at his disposal. (f)

Rejection and Non-Acceptance of Goods sold. — In cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed. (g) In cases of executory contracts when there is a warranty of quality, the purchaser is not only not bound to receive the goods unless they correspond with the warranty, but even after they have been delivered by the vendor, he may reject them after discovering the defect, and if he has paid for them, he may recover back the price. It is, however, generally neces-

Sale, p. 324; and *Castle v. Swarder*, 6 65, 67; *Noy*, 55; *Wood v. Manley*, 11 H. & N. 834; 30 L. J. Ex. 310. Ad. & E. 34; and see *post*, p. * 948.

(e) *Schneider v. Foster*, 2 H. & N. 4. (g) *Behn v. Burness*, 3 B. & S. 756;

(f) *Salter v. Woollams*, Sc. N. B. 32 L. J. Q. B. 204.

to accept damp and mouldy wool or moist brown sugar, unless it be proved that the sample was fairly taken from the bulk, and that the property passed by the bargain. (v) Nor is the purchaser bound to accept goods partly of the quality bargained for and partly of an inferior quality, if they are mixed together so that the whole bulk becomes of an inferior quality to that bargained for. (x) If a vendor agrees to manufacture and deliver a specific chattel to a purchaser at a distant place, the vendee is not justified in refusing to accept it by reason of deterioration necessarily incident to the transit. (y) If the article was not inspected by the purchaser at the time of the sale, but was selected by the vendor, the purchaser has a right to inspect and examine it before acceptance; and if on inspection it turns out to be a different article from that which was bargained for and agreed to be sold, he may reject it. (z) But if the article has been inspected and selected by the purchaser prior to the sale, or has been purchased with all faults, the purchaser has no right of inspection before payment. (a) If the purchaser means to insist on his right of rejection, he must do some unequivocal [* 945] *act to show that he does so reject; but he is not bound to send the goods back, or to place them in neutral custody. (b)

If the purchaser waives his right to reject, and receives the thing sold, and has the enjoyment of it, he cannot afterward treat the descriptive statement as a condition, but he can only treat it as an agreement, for the breach of which he may bring an action to recover damages. (c) But when a bargain has been made for the manufacture of a certain specified quantity of goods to be supplied from time to time, and paid for after delivery, if the purchaser, having accepted and paid for a portion

(v) *Sieveking v. Dutton*, 3 C. B. 331; *Curtis v. Pugh*, 10 Q. B. 111; 16 L. J. 15 L. J. C. P. 276; *Josling v. Kingsford*, Q. B. 199; *Lorymer v. Smith*, 1 B. & C. 13 C. B. n. s. 447; 32 L. J. C. P. 94. 1; *Isherwood v. Whitmore*, 11 M. & W. 347.

(x) *Nicholson v. Bradfield Union, L.* 347.
R. 1 Q. B. 620; 7 B. & S. 747; 35 L. J. Q. B. 176. (a) *Pettit v. Mitchell*, 4 M. & Gr. 836.

(y) *Bull v. Robison*, 10 Exch. 346; (b) *Grimoldby v. Wells*, L. R. 10 C. 24 L. J. Ex. 165. P. 391.

(z) *Tye v. Fynmore*, 3 Campb. 461; (c) *Behn v. Burness*, 3 B. L. S. 756; *Toulmin v. Hedley*, 2 Car. & K. 157; 32 L. J. Q. B. 204.

of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for damages. (*d*) The plaintiffs undertook to supply the defendants with 30,000 tons of ore at 25s. 6d. per ton, cost freight and insurance, payment to be made by cash on delivery of each shipment, "deliveries to be made at the rate of from 800 to 1,300 tons per month, provided we are able to procure tonnage at or under 16s. 6d. per ton. No responsibility to attach to us should we be prevented from delivering all or any portion of the ore through any dangers of the mines, &c." The plaintiffs withheld ore while freights were above the limit, and then sought to deliver ore according to contract, and it was held that they might, but that they might not deliver ore which they had been prevented delivering by dangers of the mines, &c. (*e*) In an action on a contract of sale for the non-acceptance of goods sold, the vendor must show that he was ready and willing to deliver the goods to the purchaser according to the terms of the contract. (*f*)

Non-Payment of the Price — Goods bargained and sold. — A contract of barter (*ante*, p. *865) cannot be changed into a contract to pay in money, unless the parties come to a fresh agreement to that effect. (*g*) If goods are sold subject to a condition that, if the purchase-money be not paid by a particular day, they may be resold by the vendor, and the loss on the resale recovered from the purchaser making default, and the right of resale is exercised, or if the purchaser has refused to take and pay for the goods, and the goods have been resold by the vendor, the vendor cannot, after such resale, recover the price * of the goods, but only the damage he has [* 946] sustained by reason of the non-acceptance of the goods and non-payment of the price. (*h*) If the price to be paid for

(*d*) *Cort v. Amberg, &c.*, 17 Q. B. 148; 20 L. J. Q. B. 466. (*g*) *ger v. Dacre*, 12 M. & W. 434; *Hannuic v. Goldner*, 11 ib. 856.

(*e*) *De Oleaga v. West Cumberland Iron Co.*, 4 Q. B. D. 472. (*g*) *Harrison v. Luke*, 14 M. & W. 141; *Atkinson v. Smith*, ib. 695.

(*f*) *Boyd v. Lett*, 1 C. B. 222; *Gran-* (*h*) *Lamond v. Davall*, 9 Q. B. 1030;

the goods is to be fixed by the valuation or award of a third party, to be named by the purchaser, and the latter refuses to name or appoint such valuer, the vendor cannot sue for the price, but must bring an action against the purchaser for refusing to make the nomination or appointment. (i) Everything that is to be done on the part of the vendor to complete the sale and transfer the ownership of the thing sold to the purchaser, and place it at his disposal, so far, at least, as to enable the latter to obtain possession of it, and deal with it as he may think fit, on payment or tender of the price, must be performed before an action for the price can be maintained. (k)

When the right of property in the subject-matter of the sale has passed by the bargain to the purchaser, the latter is not released, as we have already seen, from his obligation to pay the price, by reason of the vendor's neglect to deliver the goods at the time appointed for delivery, unless the time for delivery is of the essence of the contract, and it appears to have been the intention of the parties that the sale should be at an end in case of non-delivery on the day appointed. If the sale is a sale of an ascertained share of a particular chattel, such as a share of a coach or a horse, or a share of a butt of wine, or a cistern of oil, or a cargo of corn, sold as an undivided quantity at an ascertained price, the sale is complete, and the vendor is entitled to the price as soon as he has transferred his share and interest by a properly authenticated contract. In sales of this kind, the vendor only undertakes to sell and transfer the share, and to convey to the purchaser the same right to the undivided quantity that he himself possessed. He does not engage to put the purchaser into possession of the coach or the horse, or to divide the wine, or measure off the oil or the corn, and put the purchaser into separate possession of the share.

Goods sold and delivered. — When goods and chattels have been actually delivered to, and received by, a third party under circumstances fairly giving rise to a presumption that they were

16 L. J. Q. B. 136; *Hore v. Milner*, 1 (k) *Smith v. Chance*, 2 B. & Ald. Peake, 58. 753; *Boswell v. Kilborn*, 15 Moo. P. C.

(i) *Thurnell v. Balbirnie*, 2 M. & W. 309. 786.

bought and sold, a jury may infer, as we have already seen, the existence of a contract of sale between the parties, although not one word was said about buying and selling, and no price was mentioned or fixed. (*l*) When an act of parliament for the * purpose of protecting buyers, prescribes regulations [* 947] to be followed in the sale and delivery, the vendor cannot, if he neglects to observe such regulations, recover the price. (*m*) Where goods have been sold and delivered, but it is a condition that the goods should be capable of performing certain work, and the buyer prevents the possibility of the seller performing the condition, it must be taken to be performed, and the price is recoverable. (*n*)

Sale of Goods on Credit. — If goods are sold on credit, the vendor cannot sue for the price until the period of credit has expired, (*o*) unless the giving of credit has been made conditional on the performance of some precedent act by the purchaser. If the goods are sold upon the terms that the purchaser is to give his acceptance at two or more months for the price, and are then delivered to the purchaser, and the latter refuses to give his acceptance according to the contract, the vendor cannot forthwith bring an action for goods sold and delivered, but must either sue on the promise to give the acceptance, or wait the termination of the period during which the bill had to run. (*p*) If, however, the goods are sold on the terms that the vendor is to have a bill at three months, or cash, and the purchaser fails to give the bill, the vendor may at once sue for a fair and reasonable price in cash. (*q*) Where by the terms of a contract of sale, the purchaser was to pay down £30 and £214 by bills of £30 each, payable in succession every three months, and the purchaser omitted to pay the £30 and to give the bills, it was held that the vendor could not maintain an action for the price of the goods until the expiration of the period at which

(*l*) *Ante*, p. * 23. *Bennett v. Henderson*, 2 Stark. 550; *Coles v. Bulman*, 6 C. B. 184.

(*m*) *Cundell v. Dawson*, 4 C. B. 378.

(*n*) *Mackay v. Dick*, 6 Ap. Cas. 251.

(*o*) *Paul v. Dod*, 2 C. B. 800; *Price v. Nixon*, 5 Taunt. 338.

(*p*) *Mussen v. Price*, 4 East, 147; *Dutton v. Solomonson*, 3 B. & P. 582.

(*q*) *Rugg v. Weir*, 16 C. B. x. s. 477; *Nickson v. Jepson*, 2 Stark. 227; and see *post*, *Conditional Sales*.

the last bill would become due, but must sue on the special contract for the non-payment of the money and the non-delivery of the bills. (*r*) But where the defendant, when a portion of the goods has been delivered under the contract, repudiates the transaction and refuses to receive any more, the plaintiff has a right to treat the contract as rescinded, and to sue for the value of the goods which have been delivered. (*s*) If the contract is entire for the delivery of an undivided quantity of goods at a certain price by a certain time, the vendor cannot, after delivering part of the goods, sue for the price of that part until the whole has been delivered; (*t*) but if he delivers part, [* 948] and such part is retained * and used by the purchaser after the time for the delivery of the whole has expired, the purchaser is bound, notwithstanding the non-performance of the contract by the vendor, to pay what the part retained and used by him may be reasonably worth. (*u*) And even where the purchaser has not accepted such part, he may be compelled to do so. (*x*)

Actual and Constructive Delivery of Goods.¹ — The delivery of goods may be either real or symbolical, actual or constructive.

¹ Consult *Seymour v. O'Keefe*, 44 Conn. 128; *Calkins v. Lockwood*, 17 Conn. 164; *Meade v. Smith*, 16 Conn. 346; *Wilson v. Paulsen*, 57 Ga. 596; *Allen v. Carr*, 85 Ill. 388; *Thompson v. Yeck*, 21 Ill. 73; *Lefaver v. Mires*, 81 Ill. 456; *Sutton v. Ballou*, 46 Iowa, 517; *Richardson v. Rardin*, 88 Ill. 124; *Fairfield Bridge Co. v. Nye*, 60 Me. 372; *Mosher v. Smith*, 67 Me. 172; *Bethel Steam Mill Co. v. Brown*, 57 Me. 9; *Vining v. Gilbreth*, 39 Me. 496; *Thorndike v. Bath*, 114 Mass. 116; *Green v. Rowland*, 16 Gray, 58; *Packard v. Wood*, 4 Gray, 307; *Carter v. Willard*, 19 Pick. 1; *Mount Hope Iron Co. v. Buffington*, 103 Mass. 62; *Uhl v. Robinson*, 8 Neb. 272; *Conway v. Edwards*, 6 Nev. 190; *Crawford v. Forristall*, 58 N. H. 114; s. c. 57 N. H. 102; *Shindler v. Houston*, 1 N. Y. 261; *Haak v. Linderman*, 64 Pa. St. 499; *Morgan v. Taylor*, 32 Tex. 563; *Chase v. Snow*, 48 Vt. 436; *Pettengill v. Elkins*, 50 Vt. 431.

See, further, on constructive or symbolical delivery, *Puckett v. Reed*, 31 Ark. 131; *Walden v. Murdock*, 23 Cal. 540; *Taylor v. Richardson*, 4 Houst. 300; *People's Bank v. Gridley*, 91 Ill. 457; *Adams v. Foley*, 4 Iowa, 52; *Newcomb v. Cabell*, 10 Bush, 460; *Leisherness v. Berry*, 38 Me. 83; *Boynton v. Veazie*, 24 Me.

(*r*) *Paul v. Dod*, 2 C. B. 800; 15 L. J. C. P. 177.

(*s*) *Bartholomew v. Markwick*, 15 C. B. N. s. 711; 33 L. J. C. P. 145; *Lee v. Risdon*, 7 Taunt. 189.

(*t*) *Reuter v. Sala*, 4 C. P. D. 239, C. A.

(*u*) *Oxendale v. Wetherell*, 4 M. & R. 431.

(*x*) *Brandt v. Lawrence*, 1 Q. B. D. 344.

When the subject-matter of the sale is capable of manual delivery and occupation, — such as a watch, a book, or a gun, — and is actually transferred from the hand of the vendor to that of the purchaser or his agent, there is a real or actual delivery. So if, being a bulky commodity, it is removed from the warehouse of the vendor to that of the purchaser, and placed under the power and control of the latter, there is an actual delivery. But although there has been no manual transfer from hand to hand, and the goods have not been removed from the place where they were deposited at the time of the sale, if the vendor has handed the key of a box or warehouse where they were deposited to the purchaser, in order that he may remove them, or has given to the purchaser a delivery order or warrant for their removal, and placed them at the disposal of the latter, there is a symbolical or constructive delivery, provided, at the time of the delivery of the key or warrant, the particular goods to be removed had been weighed out or measured or separated from the bulk and identified, and nothing but delivery remained to be performed by the vendor in order to complete his part of the contract of sale. (y)

When goods and chattels are incapable of manual occupation and delivery, such as a haystack standing in a meadow, the same strict evidence of transfer cannot ordinarily be given, and it is enough for the vendor to show that the purchaser was himself to have fetched away the article, and that the vendor has given him the power and opportunity of removing it. (z) But if the thing sold remains in the vendor's dwelling-house or warehouse, the mere circumstance that the vendor has placed the article at the disposal of the purchaser, and given him an opportunity of removing it if he had thought fit, would not, it is apprehended, afford even *prima facie* evidence of delivery. (a)

286; *Jewett v. Warren*, 12 Mass. 300; *Shurtleff v. Willard*, 19 Pick. 210; *Hayden v. Demets*, 53 N. Y. 426; *Terry v. Wheeler*, 25 N. Y. 520; *Audenreid v. Randall*, 3 Cliff. 99.

(y) *Chaplin v. Rogers*, 1 East, 194; *Tansley v. Turner*, 2 Sc. 238; 2 Bing. *Greaves v. Hepke*, 2 B. & Ald. 133; N. C. 151.

Marshall v. Green, 1 C. P. D. 35.

(a) *Thompson v. Macaroni*, 3 B. &

(z) *Smith v. Chance*, 2 B. & Ald. C. 2.

755; *Wood v. Manley*, 11 Ad. & E. 35;

And it must be observed that the mere placing of goods at the disposal of the purchaser, or putting it in his power to [* 949] remove them, will not in any case constitute a * delivery, if the vendor retains his lien for the price, or possesses any dominion or control over them. (b) Thus if a contract has been entered into for the sale of oil, wine, or brandy, and the portion to be delivered is separated from a mass of the commodity in bulk, and put into casks marked with the name of the purchaser, and placed at his disposal, there is no delivery if the article remains at the time, and notwithstanding such transposition and appropriation, in the warehouse of the vendor and under his dominion and control. And if a portion of the quantity so separated is actually delivered into the hands of the purchaser, this will not vary the condition of the vendor, if the contract is entire and indivisible, as he has a lien upon the residue, and has not done that which is tantamount to a delivery of the whole. But if the contract of sale is divisible, and the portion removed can be referred to a separate and distinct contract of sale, then the vendor will be entitled to sue for the price of the portion so handed over to the purchaser. (c) If the goods, however, are put into the possession of a third party, on the understanding that they are not to be removed by the purchaser until the price is paid, an action may, it seems, be maintained by the vendor for the price of them as goods sold and delivered. (d) A contract for the sale of cotton of a given quality is not performed by a tender of a larger quantity, out of which the buyer is required to select those bales which answer the description of the cotton contracted for. (e)

Proof of Delivery.—The question of delivery is a question of fact, and is to be determined by reference to all the surrounding circumstances, which must be looked at in order to see if there has been a virtual change of possession as well as a change of ownership. (f) The taking of samples, coopering casks, and the general exercise of acts of ownership, by the purchaser over

(b) *Goodall v. Skelton*, 2 H. Bl. 316.

(c) *Holderness v. Shackels*, 8 B. & C. 621; 3 M. & R. 33.

(d) *Doddsley v. Varley*, 12 Ad. & E. 634.

(e) *Rylands v. Kreitman*, 19 C. B.

x. s. 351; *Boswell v. Kilborn*, 15 Moo. P. C. 309

(f) *Blenkinsop v. Clayton*, 1 Moore, 331.

the subject-matter of the sale, in those cases where nothing but delivery remains to be performed to execute the contract, are circumstances from which an actual transfer of the possession of the article to the purchaser may be fairly presumed; (g) but they are equivocal acts, open to explanation, and afford no sufficient or satisfactory proof of delivery, if they have been done without the knowledge or sanction of the vendor. (h) The marking of goods and packing them up in boxes or cloths belonging to the purchaser * do not constitute a delivery so long [* 950] as the goods remain in the possession of the vendor, inasmuch as the latter has not, until he has actually parted with the possession of them, lost his lien for the price; (i) and the delivery of part of the goods does not, as before mentioned, operate as a constructive delivery of the whole, so as to deprive the vendor of his right to the possession of the residue until payment of the price. (k) The unpacking or unloading of goods for the purpose of inspection and examination by a purchaser who has not previously selected or examined them (*ante*, p. * 919), is not necessarily an acceptance and taking possession of the goods by the purchaser so as to render him liable to an action for the price. (l) But if he lands and stores the goods, and keeps them an unreasonable time, or does more than is necessary to be done for inspection and examination, he makes the goods his own. (m)

Delivery to Carriers.¹ — Although the acceptance and receipt

¹ See *ante*, p. * 934. That the delivery of the goods to the carrier is equivalent to a delivery to the vendee, see *First Nat. Bank v. Crocker*, 111 Mass. 166; *Rodgers v. Phillips*, 40 N. Y. 519; *Magruder v. Gage*, 33 Md. 344; *Stanton v. Eager*, 16 Pick. 467; *Putnam v. Tillotson*, 13 Met. (Mass.) 517; *Johnson v. Stoddard*, 100 Mass. 306; *Orcutt v. Nelson*, 1 Gray, 536; *Merchant v. Chapman*, 4 Allen, 362; *Hunter v. Wright*, 12 Allen, 548; *Woolsey v. Bailey*, 27 N. H. 217; *Arnold v. Prout*, 51 N. H. 587; *Garland v. Lane*, 46 N. H. 245; *Goodwyn v. Douglas*, 1 Cheves, 174; *Waldron v. Romaine*, 22 N. Y. 368; *Summeril v. Elder*, 1 Binn. 106; *Griffith v. Ingledew*, 6 Serg. & R. 429; *Walkins v. Paine*, 57 Ga. 50; *Wing v. Clark*, 24 Me. 366; *Ranny v. Higby*, 5 Wis. 62; *Gwyn v. Richmond, &c. R. R. Co.*, 85 N. C. 429; *Bullock v. Tschergi*, 13 Fed. Reporter, 345.

(g) *Wood v. Tassell*, 6 Q. B. 236.

(l) *Curtis v. Pugh*, 10 Q. B. 111; 16

(h) *Dixon v. Yates*, 5 B. & Ad. 313; L. J. Q. B. 199; *Toulmin v. Hedley*, 2

2 N. & M. 177; *Craven v. Ryder*, 6 Car. & K. 157.

Taunt. 433; see *post*, p. * 959 *et seq.*

(m) *Chapman v. Morton*, 11 M. &

(i) *Boulter v. Arnott*, 1 C. & M. 333. W. 540.

(k) *Bunney v. Poyntz*, 4 B. & Ad. 568.

of a carrier to whom goods are delivered to be conveyed to a purchaser are not the acceptance and receipt of the purchaser within the meaning of the statute of frauds (*ante*, p. * 934), yet a delivery by a vendor to a carrier, of goods sold is a sufficient delivery to the purchaser to enable the vendor (if the contract of sale is properly authenticated by a memorandum in writing signed by the purchaser, or by earnest or part payment, *ante*, p. * 164), to maintain an action for the price. The delivery of the goods to the carrier operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring an action for any injury done to the goods; and if any accident happens to the goods, it is at his risk, (*n*) unless by the terms of the contract the transfer of the right of property and risk are made dependent on the arrival of the goods at their place of destination. (*o*) The only exception to the purchaser's rights over the goods is that the vendor, in case of the insolvency of the purchaser, may stop them *in transitu*. (*p*) The placing of goods ordered on board ship is good evidence of delivery, but not of acceptance and receipt within the statute of frauds. The vendor, after he has once parted with the goods in fulfilment of an absolute and unconditional contract of sale, and placed them in a course of transmission to the purchaser, [* 951] cannot, as we have already seen, * lawfully retake them from the carrier, unless the purchaser becomes bankrupt or insolvent whilst they are in the hands of the carrier, or unless the goods have been sent merely on approval, or under some special contract or conditional sale, reserving to the vendor certain rights over the goods. (*q*)

Damages from Non-Performance of a Contract for the Sale of Goods and Chattels — Non-Performance by the Purchaser. — If a vendor brings his action against a purchaser for the non-payment of the price of goods sold and delivered at a fixed

(*n*) *Dutton v. Solomonson*, 3 B. & P. 584; *Gronin v. Mendham*, 5 M. & S. 191; *Lord Cottenham, Dunlop v. Lambert*, 6 Cl. & Fin. 621; *Tregelles v. Sewell*, 7 H. & N. 574.

(*o*) *Calcutta, &c. Steam Navigation Company v. De Mattos*, *ante*, p. * 934.

(*p*) *Ex parte Rosevear Clay Company*, 11 Ch. D. 560, C. A.

(*q*) *Ante*, p. * 934; *Wilmshurst v. Bowker*, 8 Sc. N. R. 571; 7 M. & Gr. 882; *Key v. Cotesworth*, 22 L. J. Ex. 4.

price, and the delivery is proved, the measure of damages is obviously the price agreed to be paid. If no price was fixed and determined upon, the measure of damages will be the usual and customary price for goods of a similar character, quality, and description. If the goods have not been delivered to the purchaser, but the ownership and right of property therein have been transferred by the bargain to the latter, and the vendor sues for the price of them as "goods bargained and sold," the measure of damages is, in like manner, the price agreed upon, which must be paid in full, without any deduction in respect of losses by fire or tempest or accident. But if the right of property has not been divested out of the vendor and transferred to the purchaser, the vendor cannot bring an action for the price of the goods, for he cannot have both the goods and the price; but he may sue the purchaser for his breach of contract in not accepting them, in which case the measure of damages will be the difference between the agreed price and the marketable value of the goods at the time they were tendered to, and refused acceptance by, the purchaser, in addition to the costs, charges, and expenses necessarily incurred by the vendor in fulfilling his part of the contract. If the market price of the article has declined after the making of the contract, and the purchaser gives notice to the vendor that he will not accept, the proper measure of damages is not the difference between the contract price and the market price on the day the notice was given, but at the time when the contract ought to have been fulfilled by the acceptance of the goods, if it had been carried into effect as originally intended. (r) If the goods have been resold by the vendor within a reasonable time after the breach of contract by the purchaser, the measure of damages will be the difference between the price agreed to be given and the price realized on the resale, with the costs and expenses of the resale; but if the resale has been unreasonably delayed until * the market [* 952] has fallen, the price realized on such resale will not afford a true criterion of the damage. (s)

(r) *Philpotts v. Evans*, 5 M. & W. 475; *Boorman v. Nash*, 9 B. & C. 145; 162; *Pott v. Flather*, 16 L. J. Q. B. 366.
(s) *Stewart v. Cauty*, 8 M. & W.

Damages from Non-Performance by the Vendor.— If a purchaser brings an action against the vendor for a breach of contract in not delivering goods sold, or not tendering them for acceptance, or for reselling and converting them to his own use, the measure of damages will be the difference between the price agreed to be paid and the marketable value of the goods at the time and place when and where they ought to have been delivered to the purchaser. (t) Where the defendant did not deliver a quantity of iron in three equal proportions as agreed, it was held that the true measure of damages in the absence of proof by the defendant that the plaintiff might have mitigated the loss, was the sum of the differences between the contract and market prices of each third of the quantity on the respective dates at which they ought to have been delivered. (u) The plaintiff, as trustee of L, sued the defendant for damages arising from the defendant having sold to L rupee paper upon a false representation. L sold the rupee paper some time after at a great loss. It was held that such loss was not the true measure of damages, but it was the difference between the price paid and the price in the market as soon as L had reasonable time to ascertain his loss. (x) If the contract is for the sale and delivery of articles which can be readily bought in the public market, the measure of damages is the difference between the agreed price and what it would have cost the buyer if he had gone into the market and purchased similar goods at the time the contract was broken. (y) But where, after breach of a written agreement to deliver goods, the buyer, at the seller's request, waited several months before buying goods in the place of those contracted for, it was held that the true measure of damages was the difference between the contract price and the price of the substituted goods, though this price was greater than that of such goods when the contract was first broken. (z) If there is no market for the

(t) *Chinery v. Viall*, 5 H. & N. 288; 29 L. J. Ex. 180; *Dingle v. Hare*, 7 C. B. n. s. 145; *Peterson v. Ayre*, 13 C. B. 353.

(u) *Brown v. Muller*, L. R. 7 Ex. 319; 41 L. J. Ex. 214; *Roper v. Johnson*, L. R. 8 C. P. 167; 42 L. J. C. P.

165. See also *Tyers v. Rosedale Iron Co.*, L. R. 10 Ex. 195.

(x) *Waddell v. Blockley*, 4 Q. B. D. 678, C. A.

(y) *Josling v. Irvine*, *post*, p. *1109.

(z) *Ogle v. Vane (Earl)*, L. R. 2 Q. B. 275; L. R. 3 Q. B. 272; 36 L. J. Q. B. 175; 37 L. J. Q. B. 77.

article contracted for, the measure of damages is the value of it at the time of the breach, and if the plaintiff does the best he can, and buys the nearest in price and quality that he can get, he is entitled to recover the difference * in the [* 953] price. (a) If the goods are ordered in England by a merchant abroad, for the purpose of being exported and resold in a foreign market, and the order is accepted, and the vendor, knowing that the goods are required for a foreign market, undertakes to forward the goods, but neglects so to do, the measure of damages is not the difference between the agreed price and the marketable value of the goods in England, but between the price and the marketable value of the goods at the place where they would have been resold by the purchaser. (b) The purchaser cannot recover as special damage the loss of anticipated profits in the home market; nor if he has contracted to resell the goods at a profit, can he recover such profit. (c)

If the vendor has a month, or any specific period of time, allowed to him for making the delivery, and finds, before the time has elapsed, that he will be unable to complete the delivery, and gives notice to the purchaser that he refuses to proceed therewith, and the price rises, the measure of damages is the difference between the contract price and the higher price of the subject-matter on the last day of the period within which the delivery ought to have been made. (d) If the vendor of shares neglects to deliver the shares or complete the transfer, the measure of damages is the difference between the price agreed to be paid and the market price on the day on which the sale should have been perfected; and the purchaser is not entitled to damages in respect of a farther advance of price taking place afterward. (e) In a case where the purchase-money had been paid in advance, the true measure of damages was held to

(a) *Hinde v. Liddell*, L. R. 10 Q. B. 265. *Dunlop v. Higgins*, 1 H. L. C. 403, and overruling *Waters v. Towers*, 8 Exch. 401. See also *Thol v. Henderson*, 8 Q. B. D. 457.

(b) *Bridge v. Wain*, 1 Stark. 504; *Borries v. Hutchinson*, 18 C. B. n. s. 445; 34 L. J. C. P. 169; *O'Hanlan v. Gt. West. Rail. Co.*, 6 B. & S. 484; 34 L. J. Q. B. 154. (d) *Leigh v. Paterson*, 8 Taunt. 540; *Loder v. Kekule*, 3 C. B. n. s. 140.

(e) *Tempest v. Kilner*, 3 C. B. 253; *Gainsford v. Carroll*, 2 B. & C. 624; (c) *Williams v. Reynolds*, 34 L. J. Q. B. 221, qualifying and restricting *Shaw v. Holland*, 15 M. & W. 145.

be, not the amount of the purchase-money, but the marketable value of the property at the time it ought to have been delivered to the purchaser; for to that extent only was the purchaser damnified, unless he had sustained some special damage by reason of the non-delivery at the time appointed. (*f*) But in the case of a contract for the sale and purchase of shares, when the vendor holds in his hands the money of the purchaser, and thereby prevents him from using it, and from buying other shares therewith, the proper measure of damages would seem to be the highest price for which the same number of shares might [* 954] be purchased in the market, either on the *day the contract was broken, or at any time between that day and the day of trial, if the action has been brought without any unreasonable or improper delay. (*g*) When the action is not brought upon the special contract, but for the recovery of the purchase-money, as money had and received, on the ground of a total failure of the consideration for the payment, the whole purchase-money is recoverable (*post*, p. * 1182).

If a bill has been given for the price of the goods, and the bill has been dishonored before delivery, the vendor acquires a right of withholding delivery, analogous to the right of an unpaid vendor to stop *in transitu*. (*h*)

Specific Performance of Contracts for the Sale of Goods and Chattels. — Performance of a contract for the sale of goods and chattels will not generally be decreed, not because of their personal nature, but because damages at law, calculated on the market price of the goods, are in general as complete a remedy for the purchaser as the delivery of the goods contracted for, inasmuch as with the damages he may ordinarily purchase the same quantity of the like goods. (*i*) But a contract for the sale of a specific chattel, such as a barge or a vessel, (*k*) or a chattel having a "*pretium affectionis*" or a peculiar value resting on its individu-

(*f*) *Dutch v. Warren*, cited 2 Burr. 1011, 1012; *Valpy v. Oakeley*, 16 Q. B. 941. (*h*) *Griffiths v. Perry*, 1 Ell. & Ell. 680; 28 L. J. Q. B. 204.

(*g*) *Owen v. Routh*, 14 C. B. 337; 23 L. J. C. P. 105; *Shaw v. Holland*, *ante*, p. * 953; *Sedgwick on Damages*, 265. (*i*) *Story's Eq. Jur.* sect. 17; *Buxton v. Lister*, 3 Atk. 383; *Pooley v. Budd*, 14 Beav. 43.

(*k*) *Claringbould v. Curtis*, 21 L. J. Ch. 541.

ality, such as "the Pusey Horn;" (*l*) St. Margaret's silver tobacco-box; (*m*) the silver altar-piece of the Duke of Somerset; (*n*) the insignia and decorations of a lodge of freemasons; (*o*) and old family pictures, (*p*) and heirlooms, (*q*) will be enforced in specie. A contract for the sale of five hundred chests of tea is not a contract which can be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell certain chests of a particular kind of tea deposited in a particular locality may be enforced in specie; and the purchaser may obtain an injunction to prevent the seller from delivering it to any other person. (*r*) Wherever the object of sale is such that there is an uncertainty whether the purchaser can procure another chattel of the same kind and value, or the possession of it is desirable for certain purposes which no other chattel of the same kind will answer, a specific performance will be decreed. (*s*)

* **Abatement of the Contract Price.** — In contracts for [* 955] the sale of goods and chattels, the agreed price may be reduced by evidence showing that the goods were not of the proper quality or description; (*t*) and the purchaser is not, by reason of his having given such evidence, and obtained a reduction in the amount of the contract price in an action brought against him by the vendor, precluded from bringing his cross-action to recover compensation for any special damage that he may have sustained by reason of the breach of the contract. (*u*) Care, however, must be taken to mark the distinction between an action on the contract itself for the agreed price, and an action upon a bill of exchange or promissory note given by way of payment for the amount. In the former, the value only can be recovered; in the latter, the party holding bills given for the price of the goods supplied can recover on them, unless there has

(*l*) *Pusey v. Pusey*, 1 Vern. 272.

(*m*) *Fells v. Read*, 3 Ves. 70.

(*n*) *Duke of Somerset v. Cookson*, 3 P. Wms. 389.

(*o*) *Lloyd v. Loaring*, 6 Ves. 773.

(*p*) *Lady Arundell v. Phipps*, 10 Ves. 139; *Lowther v. Lowther*, 13 Ves. 95.

(*q*) *Earl Macclesfield v. Davis*, 3 Ves. & B. 16.

(*r*) *Lord Westbury, Holroyd v. Marshall*, 33 L. J. Ch. 196; 10 H. L. C.

(*s*) *Falcke v. Gray*, 29 L. J. Ch. 28.

(*t*) *Cutler v. Close*, 5 C. & P. 337;

Allen v. Cameron, 1 Cr. & M. 832; *Turner v. Diaper*, 2 M. & Gr. 241.

(*u*) *Mondel v. Steel*, 8 M. & W. 858; *Rigge v. Burbidge*, 15 M. & W. 598.

been a total failure of the consideration. If the consideration fails partially, as by the inferiority of the article furnished, the buyer must seek his remedy by a cross-action. (x) Thus where a contract was entered into for the purchase of goods of "good quality and moderate price," and the price was estimated at £1000, and bills were given for that amount, it was held to be no defence to an action on the bills that the goods turned out to be worth much less than the estimated price, and that the acceptor had paid on the bills more than the real value of the goods. (y) The contract also may be divisible; but the security is entire.

Of the Vendor's Lien for the Price of Goods sold. — When different times are not expressly appointed for payment and delivery, the acts of payment and delivery are, as we have seen, concurrent, and constitute mutual conditions to be performed at the same time, so that the purchaser cannot demand the thing sold without paying or offering to pay the price, nor the vendor the price without delivering or offering to deliver the subject-matter of the sale. "If I sell you my horse for £10, if you will have the horse, I must have the money; or if I will have the money, you must have the horse." (z)

When the Vendor may resell. — If ascertained chattels have been bargained and sold by a properly authenticated contract, and the right of property has passed to the purchaser, the vendor cannot, as we have already seen, rescind the contract [*956] and revest the *right of property in himself, and resell the goods, by reason of the neglect of the vendee to take and pay for the goods at the time appointed; (a) but if the purchaser continues in default, and will not perform his part of the contract, the vendor may resell them within a reasonable period after he has given the purchaser express notice of his intention

(x) *Tye v. Gwynne*, 2 Campb. 346; (a) *Martindale v. Smith*, 1 Q. B. 395; *Milgate v. Kebble*, 3 Sc. N. R. East, 486; *Camac v. Warriner*, 1 C. B. 358; 3 M. & Gr. 100; *Wilmshurst v. Bowker*, 8 Sc. N. R. 571; 7 N. & Gr. 882; *Key v. Cotesworth*, 7 Exch. 607; (y) *Obbard v. Betham*, M. & M. 483. 22 L. J. Ex. 4; *Page v. Cowasjee*, L. R. Lock v. Wright, 1 Str. 571; 8 Mod. 41; 1 P. C. 127. Withers v. Reynolds, 2 B. & Ad. 882; Atkinson v. Smith, 14 M. & W. 695.

so to do. A mere notice to remove the goods and pay the price will not justify the vendor in reselling; (b) but if the latter gives to the purchaser a distinct intimation of his intention to resell in case of the non-removal and non-payment of the goods within a reasonable period from the receipt of the notice, and the purchaser then refuses to take and pay for the goods, he may fairly be deemed, either to have himself repudiated or abandoned the contract, or to be an assenting party to the sale, or to have given the vendor an implied authority to resell. (c) If the goods are of a perishable nature, and the purchaser refuses to receive them, the vendor is entitled to resell them, to prevent their deterioration or destruction, after giving the purchaser due notice of his intention.

Insolvency of the Purchaser.— When the purchaser becomes insolvent before the contract for sale has been completely performed, the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered, as well as the price of those still to be delivered. (d) And it makes no difference in this respect whether the contract is for the sale of specific goods or for the sale of goods to be delivered by instalments. (e) But there must be such an admission or proof of insolvency as amounts to a refusal to pay. (f) Until actual possession of goods sold has been delivered to the purchaser, the vendor's right of lien can be set up as against the assignee or trustee of the purchaser upon the insolvency of the latter. (g) The trustee has a right to elect to complete the contract by paying cash within a reasonable time; but if he neglects to do so, the vendor may resell the goods; and it seems that a

(b) *Greaves v. Ashlin*, 3 Campb. 426.

(c) *MacClean v. Dunn*, 1 Moo. & P. 780, 781; 4 Bing. 722; *Langfort v. Tyler*, 1 Salk. 113.

(d) *Ex parte Chalmers, in re Edwards*, L. R. 8 Ch. 289.

(e) *Ex parte Chalmers, in re Edwards, supra*.

(f) *In re Phoenix Bessemer Steel Co.*, 4 Ch. D. 108; *Ex parte Stapleton, infra*.

(g) *Grice v. Richardson*, 3 Ap. Cas. 319.

sub-purchaser would also have an option of completing the contract. (*h*)

[*957] * **Countermand of Delivery Orders.**— Similarly, if possession has not been given, and the delivery completed, under a delivery order or dock-warrant, the vendor may, if the purchaser becomes insolvent before payment, countermand the order or warrant, although it has been accepted by the person to whom it is addressed, and require the latter to hold the goods on his, the vendor's account, as before the order was made, provided the goods have not been resold and the warehouse-keeper or bailee has not attorned to the sub-purchaser in the manner presently mentioned. It has been holden that possession had not been given, and that delivery was not complete, so as to prevent the vendor from countermanding his delivery order by reason of the insolvency of the purchaser, in the following cases,— where ten tons of Riga flax were sold at £118 per ton, to be paid for by the purchaser's acceptance at three months, and the ten tons were to be separated from a larger quantity lying in bulk upon a wharf, and the vendor gave to the purchaser a delivery order on the wharfinger for the ten tons, which order was accepted by him and entered in his books, but before the weighing and separation of the ten tons from the bulk, the purchaser became insolvent; (*i*) where fifty tons of oil were sold at a fixed price, and an order for the delivery thereof was given to the purchaser, and forwarded to the wharfinger who had the custody of the oil, but it was the custom of the trade for the casks to be searched by the cooper of the vendor, and for the broker of both parties to examine them to ascertain the foot-dirt and water in each, with a view to certain allowances in respect thereof, and then the casks were to be filled up by the cooper at the expense of the vendor, and the purchaser became insolvent before these preliminary acts had been performed; (*k*) where a purchaser agreed to purchase the "small parcel of starch" belonging to the vendor, which he had seen

(*h*) *Ex parte Stapleton*, 10 Ch. D. 586.

(*i*) *Busk v. Davis*, 2 M. & S. 402; *Shepley v. Davis*, 5 Taunt. 617.

(*k*) *Wallace v. Breeds*, 13 East, 522.

lying at the warehouse of a third party, at £6 per cwt., to be paid for by bill at two months, fourteen days to be allowed for delivery, and the vendor gave a note to the purchaser addressed to the warehouse-keeper, directing him to "weigh and deliver" to the purchaser "all his starch," which order was forthwith lodged at the warehouse, and a large portion of the starch, on that and two subsequent days, was weighed and delivered to the purchaser, and removed pursuant to the order, but the purchaser became bankrupt whilst the residue remained unweighed in the warehouse, and the vendor countermanded the delivery of the unweighed residue. (*l*) Very much will depend upon custom and upon * circumstances in such cases, whether [* 958] the delivery of dock-warrants or delivery orders will bar the unpaid vendor's lien or not. (*m*)

Where, on the other hand, one hundred and thirty bales of bacon, lying at a wharf, were sold and weighed by the vendor, and set apart for the purchaser; and the price was ascertained, and was to be paid by bill at two months; and an order was given to the wharfinger to deliver the goods to the purchaser, who went to the wharf and presented the order, and with the assent of the wharfinger took possession of them and weighed the whole, and took away part, but became bankrupt before he had removed the residue, whereupon the vendor countermanded the delivery order, — it was held that, the order having been executed, and the goods actually delivered under it to the purchaser, they had irrecoverably become the property of the latter. (*n*) And where a specified quantity of oats in a particular bin in a warehouse was sold at an ascertained price, and a delivery order was entered by the warehouse-keeper in his books, and the oats were transferred into the names of the purchasers, and there were no oats in the bin besides the oats in question, it was held that the delivery was complete by the transfer in the books of the warehouse-keeper. (*o*) Whenever the vendor has given the purchaser actual possession of the goods sold, all the vendor's

(*l*) *Hanson v. Meyer*, 6 East, 625.

(*n*) *Hammond v. Anderson*, 1 B. &

(*m*) *Imperial Bank v. London & St. Katherine's Docks*, 5 Ch. D. 195; *Merchant Banking Co. v. Phoenix Steel Co.*, 5 Ch. D. 205.

P. N. R. 69.

(*o*) *Swanwick v. Sothorn*, 9 Ad. & E.

895.

rights over them are completely gone, although the things have not been removed from the vendor's premises. (*p*)

Shares and Undivided Quantities sold as such.¹ — If the vendor himself is possessed only of an undivided share of a commodity, such as a quarter of a particular pipe of wine, or cistern of oil, or the half of a specific cargo of sugar in the hands of other part owners, or of a common bailee, and he sells his share and interest as an undivided quantity, just as he possesses it, and gives the purchaser credit for the payment of the price, and hands him a delivery order which is accepted by the party having the custody of the property, the vendor cannot, if the purchaser becomes bankrupt before payment, annul the sale and prevent his assignees from obtaining separate possession of his share. (*q*)

Intervention of the Rights of Sub-Purchasers. — The indorsement and transfer of a delivery order from one purchaser to another will effect no change of possession of the goods, so long as the delivery order has not been presented to, and accepted by, the warehouse-keeper, or party holding the goods as the [* 959] agent * of the vendor, and will not deprive the unpaid vendor of his right of countermand in case of the insolvency of the first purchaser. (*r*) If the vendor is his own warehouseman, and gives to the purchaser a delivery order, or an acknowledgment that he holds the goods on account of, or to the order of, the latter, he has a right to revoke the order and retain possession of the goods in case of the insolvency of the purchaser before actual payment, so long as the delivery order remains in the hands of the latter, and the goods have not been resold, and the rights of third parties do not intervene. (*s*) But if the goods have been resold, and the second purchaser has received from his immediate vendor, the first purchaser, a deliv-

¹ *Harff v. Hires*, 18 Am. L. Reg. n. s. 161, reversing s. c. 17 ib. 11; and see notes, 17 ib. 17, and 18 ib. 172; *Reeder v. Machen*, 57 Md. 56; *Dows v. Kidder*, 84 N. Y. 121.

(*p*) *Tansley v. Turner*, *ante*, p. * 948; *Cooper v. Bill*, 34 L. J. Ex. 161.

(*q*) *Whitehouse v. Frost*, 12 East, 614.

(*r*) *M'Ewan v. Smith*, 2 H. L. C. 309.

(*s*) *Townley v. Crump*, 4 Ad. & E. 58; 5 N. & M. 606.

ery order addressed to the original vendor, which has been accepted by him, the original vendor cannot, after he has thus attorned to such second purchaser, refuse to deliver the goods to such second purchaser, pursuant to his acceptance, although the first purchaser to whom he sold becomes bankrupt before delivery and before payment of the price, and the goods were not weighed or measured over prior to the bankruptcy of the first purchaser. (t) But it is otherwise if the original vendor has given his immediate purchaser, the sub-vendor, no delivery order or dock-warrant, and has not furnished him with any evidence of title, or in any way been a party to the sub-sale. (u)

Of the Vendor's Right of Stoppage in Transitu — Goods in the Hands of Carriers and Forwarding Agents.¹— If the purchaser

¹ On stoppage in transit generally, see *Hause v. Judson*, 4 Dana, 7, 29 Am. Dec. 377, and note by A. C. Freeman, *ib.* 384; article by C. B. Elliot, 14 Cent. L. J. 242.

This right is merely an extension of the vendor's right of lien. *Rogers v. Thomas*, 20 Conn. 53; *Grout v. Hill*, 4 Gray, 361; *Rowley v. Bigelow*, 12 Pick. 313; *Newhall v. Vargas*, 13 Me. 93; s. c. 15 Me. 315; *Atkins v. Colby*, 20 N. H. 154; *Chandler v. Fulton*, 10 Tex. 2; see also *Stanton v. Eager*, 16 Pick. 475. As to the nature of the carrier's possession, see *Bradford v. Marbury*, 12 Ala. 520; *Markwald v. Creditors*, 7 Cal. 213; *Aguirre v. Parmelee*, 22 Conn. 473; *Harris v. Pratt*, 17 N. Y. 249; *Sturtevant v. Orser*, 24 N. Y. 538; *Harris v. Hart*, 6 Duer, 606; *Pottinger v. Hecksher*, 2 Grant Cas. 309; *Isley v. Stubbs*, 9 Mass. 73; *Reynolds v. Boston, &c. R. R. Co.*, 43 N. H. 591; *Cabern v. Campbell*, 30 Pa. St. 254; *Buckley v. Furniss*, 15 Wend. 137; s. c. 17 Wend. 504; *Hoover v. Tibbetts*, 13 Wis. 79.

How the right is defeasible by the vendee's transfer of the bill of lading to a purchaser in good faith and for value, see, further, *Durgy Cement Co. v. O'Brien*, 123 Mass. 12; *Seymour v. Newton*, 105 Mass. 272; *O'Brien v. Norris*, 16 Md. 122; *Hays v. Mouille*, 14 Pa. St. 48; *Covell v. Hitchcock*, 23 Wend. 611; *Becker v. Hallgarten*, 86 N. Y. 167; *Rosenthal v. Dessau*, 11 Hun, 49; *Seconet v. Nutt*, 14 B. Mon. 324; *Sawyer v. Joslin*, 20 Vt. 172; *Kitchen v. Spear*, 30 Vt. 545; *Calahan v. Babcock*, 21 Ohio St. 281; *Naylor v. Dennie*, 8 Pick. 198; *Clark v. Lynch*, 4 Daly, 83; *Dickman v. Williams*, 50 Miss. 500; *Morris v. Shryock*, *ib.* 590; *Hause v. Judson*, 4 Dana, 13; *Wood v. Yeatman*, 15 B. Mon. 270.

How the right is affected by the levy of an attachment, see *Mississippi Mills v. Union, &c. Bank*, 21 Am. L. Reg. n. s. 534, and note by J. O. Pierce, *ib.* 537; or by arrival of the goods under the control of the buyer, *Becker v. Hallgarten*, 86 N. Y. 167.

(t) *Hawes v. Watson*, 2 B. & C. 542; *Wiffen*, L. R. 5 Q. B. 660; 40 L. J. Q. B. Green v. Haythorne, 1 Stark. 447; 15.

Stoveld v. Hughes, 14 East, 316; *Pearson v. Dawson*, 27 L. J. Q. B. 248; *Griffiths v. Perry*, 1 Ell. & Ell. 680; 28 *Woodley v. Coventry*, 2 H. & C. 164; L. J. Q. B. 294; *Moakes v. Nicholson*, 32 L. J. Ex. 185; *Cooper v. Bill*, 3 H. son, 19 C. B. n. s. 290; 34 L. J. C. P. & C. 722; 34 L. J. Ex. 161; *Knights v.* 273.

becomes bankrupt or insolvent before payment of the price, the vendor is entitled, so long as the goods are *in transitu*, and have not reached their final destination or come into the manual possession of the purchaser, or that of any other party whom he may have appointed his agent finally to take possession of and keep the goods for him, to retake them and put himself into the same situation as if he had never parted with the actual possession of them. (x) And this right of the vendor is not defeated or destroyed by part payment of the purchase-money, or by the acceptance of a bill of exchange or promissory note for part of the price. (y) But it is strictly confined to the unpaid [* 960] vendor * of goods sold, (z) or to persons who stand in the position of an unpaid vendor, — as, for instance, a merchant who purchases goods on his own credit for another, (a) — and does not extend to persons who have forwarded goods to a creditor by way of payment, or in satisfaction and discharge of a debt due to the consignee. (b) The stoppage may be effected either by the vendor himself or his authorized agent, but not by a person who has no authority from the vendor to stop the goods; and a subsequent ratification by the vendor of an unauthorized stoppage is not equivalent to a precedent authority, and will not cure the defect of want of authority. (c)

Goods delivered to a carrier to be conveyed from a vendor to a purchaser are held to be *in transitu*; although they may have been consigned to a carrier specially appointed by the purchaser to receive them, or may be under the charge of a general forwarding agent of the purchaser, or in the hands of a packer, or wharfinger, or innkeeper, or any other middleman forming a mere link in the chain of communication or transmission from the buyer to the seller, and they remain *in transitu* until they have reached the hand of the vendee, or of one who is his agent,

(x) *Gibson v. Carruthers*, 8 M. & W. 338-341; *Grice v. Richardson*, 3 Ap. Cas. 319. (z) *Sweet v. Pym*, 1 East, 4; *Jenkins v. Usborne*, 7 M. & Gr. 678.

(a) *The Tigress*, 1 B. & L. 38; 32

(y) *Hodgson v. Loy*, 7 T. R. 440; L. J. Adm. 97.

Feise v. Wray, 3 East, 93; *New v. Swain*, 1 Dans. & Lld. Merc. C. 193; (b) *Vertue v. Jewell*, 4 Campb. 31.

Edwards v. Brewer, 2 M. & W. 375. See (c) *Bird v. Brown*, 4 Exch. 796; *Hutchings v. Nunes*, 1 Moo. P. C. N. S. 243. *Weguelin v. Cellier*, L. R. 6 H. L. 286.

as a warehouseman, or a packer, or a shipping agent, to give them a new destination, (*d*) or have been actually delivered to the consignee or his agent for custody, although the goods may have been shipped, and the prior carriage and wharfage dues paid by the general shipping agent of the purchaser. (*e*) But goods are not *in transitu* when they are journeying in the purchaser's own cart or carriage, under the custody or care of his own servant or agent. If the purchaser charters and despatches a vessel to a distant port to receive the goods, and they are put on board, the fact of their being *in transitu* will depend upon the character in which the master or commander receives them. If the charter-party amounts, as it generally does, merely to a contract for the carriage of merchandise, the captain having the general control and management of the vessel, and continuing the servant of the shipowners, the goods will be received by him in the character of a carrier, and will be *in transitu*. (*f*)

But if * the charter-party amounts to a demise or bail- [* 961] ment of the ship, the charterer becoming the temporary owner, and the master or commander his servant or agent, the delivery of the goods on board will be a delivery to the charterer or purchaser, and the possession of the master his possession, and the vendor will have no right to retake them, (*g*) unless the goods are shipped under a bill of lading reserving to the vendor the dominion and control over them (*post*, p. * 935). If the vendee takes the goods out of the possession of the carrier into his own before their arrival at their destination, with or without the consent of the carrier, there seems no doubt that the transit will be at an end, although in the absence of the carrier's consent there may be a wrong to him for which he would have a right of action. (*h*)

(*d*) *Bolton v. The Lancashire & Yorkshire Railway Company*, L. R. 1 C. P. 431; 35 L. J. C. P. 137; *Ex parte Rosevear Clay Co.*, 11 Ch. D. 560, C. A. de Paris, L. R. 2 P. C. 393; 40 L. J. P. C. 1. This case has been dissented from on another point. See *post*, p. * 965.

(*e*) *Slater v. Le Feuvre*, 2 Sc. 146; 2 Bing. N. C. 81; *Coates v. Railton*, 9 D. & R. 593; 6 B. & C. 422; *Gabarron v. Kreeft*, L. R. 10 Ex. 285. (*g*) *Bothling v. Inglis*, 3 East, 397; *Schotsman v. Lancashire & Yorkshire Railway Company*, L. R. 2 Ch. 332; 35 L. J. Ch. 100.

(*f*) *Ex parte Watson*, 5 Ch. D. 35, C. A.; *Rodger v. Comptoir d'Escompte Whitehead v. Anderson*, 9 M. & W. 518. (*h*)

A delivery on board the purchaser's own ship and to his own master is not inconsistent with the vendor's annexing terms to the delivery by bill of lading (*ante*, p. * 935), which may enable him to retain a right to claim the goods, and prevent delivery if the terms are not complied with. (*i*) Where goods shipped on board a vessel were to be delivered to the purchaser "in the port of London," and the vessel arrived at her moorings in the River Thames, and the goods were put into the lighters of a wharfinger employed and paid by the purchaser, it was held that the *transitus* was not determined. (*k*) Neither is the *transitus* determined by the actual arrival of the goods in boats or lighters alongside the purchaser's wharf, if the boats and lighters are used merely as the vehicle of conveyance, and not as places of deposit and ultimate reception. (*l*) The *transitus* is not determined merely by the arrival of the goods at the place of destination, but is deemed to continue until they have come into the actual possession of the purchaser. If, therefore, they are in the hands of custom-house officers at the port of destination, or are placed in quarantine, the *transitus* is not determined, and the right of stoppage is not taken away. (*m*) If the goods are not addressed directly to the consignee, but to the vendor's own agent at the place of destination, accompanied by an order directing him to deliver them to the purchaser, the goods continue in the constructive possession of the vendor until they have been actually handed over to the purchaser, or until the vendor's agent has attorned to the latter and agreed to [* 962] hold the * goods on his account and subject to his orders as previously mentioned.

Goods in the Hands of the Purchaser's Agents for Custody, on the other hand, are not *in transitu*, but are in the actual possession of the purchaser, and cannot be retaken by the unpaid vendor. An agent for custody, as distinguished from a forwarding agent, is a person who has received goods by the direction

(*i*) *Ogle v. Atkinson*, 5 Taunt. 759; (*l*) *Tucker v. Humphrey*, 1 Moo. & Turner v. Trustees, &c. Liverpool Dock, P. 378; 4 Bing. 516.
6 Exch. 543; *Moakes v. Nicholson*, 19 (m) *Northey v. Field*, 2 Esp. 614;
C. B. N. s. 290; 34 L. J. C. P. 273. *Holst v. Pownall*, 1 Esp. 240.

(*k*) *Jackson v. Nichol*, 7 Sc. 577; 5 Bing. N. C. 508.

and authority of the purchaser as a depositary or bailee invested with authority to receive goods and sell them for the purchaser, or to hold them generally on account of the latter at his disposal, and not for the purpose of helping the goods on a stage farther in a direct course of transmission to him. The delivery to such agent is a delivery to the principal, and the *transitus*, consequently, is determined as soon as the goods reach his hands; and if the transit be once at an end, it cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new and ulterior destination. (n) Where goods ordered by a purchaser for the Valparaiso market, were forwarded by railway to the shipping agents of the purchaser at Liverpool, and were put on board a vessel bound for Valparaiso, but were afterward re-landed by order of an agent of the purchaser, to be repacked, it was held that the *transitus* was determined, and that the goods had come into the actual possession of the purchaser. (o) Where the purchasers warehoused the goods with the vendors, paying warehouse rent, it was held that there had been no actual delivery of the goods to the purchasers, and that the vendor had a lien upon them upon the insolvency of the purchaser. (p)

Conversion of a Carrier, Wharfinger, or Packer into the Purchaser's Agent for Custody.—So long as the carrier holds the goods as a mere instrument of conveyance, or in the character of a forwarding agent, the *transitus* continues, and the unpaid vendor has a right to stop them; but if the carrier enters expressly or by implication into a new agreement with the purchaser, distinct from the original contract for carriage, to hold the goods for the purchaser as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character for the purpose of custody on his account, and subject to some new or farther order to be given by him, the *transitus* is at an end, and the goods are constructively in the possession of the purchaser, and cannot be

(n) *Dixon v. Baldwin*, 5 East, 184;
Ellis v. Hunt, 3 T. R. 464; *Leeds v.*
Wright, 3 B. & P. 320; *Ex parte Cooper*,
11 Ch. D. 68, C. A.

(o) *Valpy v. Gibson*, 4 C. B. 837; 16
L. J. C. P. 241.

(p) *Grice v. Richardson*, 3 Ap. Cas.
319.

retaken by the vendor. (q) But the assent of the carrier [* 963] to hold the goods as an * agent for custody on behalf of the purchaser must be clearly established, in order to put an end to the *transitus* and deprive the vendor of his right to stop the goods. A mere promise by the carrier to deliver the goods to the purchaser as soon as they can be got at, is not enough to bring them into the possession, actual or constructive, of the purchaser. (r) If the purchaser, having no warehouse of his own, is in the habit of using the warehouse of his wharfinger, or carrier, or packer, as his own, and making it the repository of his goods until he has sold them or shipped them for exportation, the *transitus* is at an end, and the delivery is complete, when the goods arrive at the warehouse and customary place of deposit, although they may immediately afterward have received a fresh destination by command of the purchaser. (s) Where twenty mats of flax were sold by a merchant of Hull to a manufacturer near Leeds, and were forwarded by railway to Leeds, and arrived at the carriers' shed at the railway terminus at Leeds, and it was the custom of the carriers to give notice to the manufacturer of the arrival of goods consigned to him, and for the latter to send wagons to convey them to his mills to be manufactured, and on the arrival of the flax, notice was given to the manufacturer by letter that, unless the goods were sent for, they would remain at warehouse rent, and the manufacturer sent his cart, and took away ten of the mats, but before the others were removed he became bankrupt, — it was held that the goods had arrived at the place of destination, and had come into the constructive possession of the vendee, and that the *transitus*, consequently, was at an end. (t) But although the goods may have been landed and warehoused at a place commonly used by the purchaser as a place of deposit, yet if the latter, finding himself to be in failing circumstances, has

(q) *Whitehead v. Anderson*, 9 M. & W. 518; *Dodson v. Wentworth*, 5 Sc. N. R. 832; 1 Smith's L. C. 5th ed. 729-747;

(r) *Coventry v. Gladstone*, L. R. 6 Eq. 44; 37 L. J. Ch. 492. *Cooper v. Bill*, 3 H. & C. 722; 34 L. J. Ex. 161; *Rowe v. Pickford*, 8 Taunt.

(s) *Scott v. Pettitt*, 3 B. & P. 469; 83; 1 Moore, 526. *Allan v. Gripper*, 2 Cr. & J. 218; *Foster v. Frampton*, 9 D. & R. 108; 6 B. & C. & W. 450, 451. (t) *Wentworth v. Outhwaite*, 10 M.

previously declared it to be his intention not to accept the goods, and not to take possession of them as owner, there has been no actual delivery, and the unpaid vendor's right of recovering possession has not been destroyed. (u) On the 27th October, goods were delivered by the vendor in London for shipment to Falmouth, and an invoice sent to the purchaser. At Falmouth, they were taken to the warehouse of an agent of the steam-packet company, who was in the habit of holding goods

* from steamers at the risk and to the order of the purchaser, and giving notice to them. Before the goods were landed, the purchaser committed an act of bankruptcy by absconding, and so no notice was given to him, and on November 4th he was adjudicated bankrupt. On that day the vendor stopped the goods in the warehouse. It was held that the *transitus* was not at an end. (x) The vendor's right to stop *in transitu* cannot be defeated by any claim of lien on the part of a carrier, wharfinger, or any other middleman, nor by a foreign attachment laid upon the goods by a creditor. (y)

Stoppage of Part of Goods sold under one entire contract of sale does not have the effect of revesting in the vendor that portion of them which has been actually delivered to the bankrupt purchaser; and a delivery of part will not have the effect of destroying the vendor's right of stoppage of the portion remaining undelivered. "What the effect of stoppage *in transitu* is," observes the Court of Exchequer, "whether entirely to rescind the contract, or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet finally decided, and there are difficulties attending each construction. If the latter supposition be adopted (as most of us are strongly inclined to think it ought to be, on the weight of authority), the vendor is entitled to retain the part actually stopped *in transitu*, until he is paid the price of the whole, but

(u) *James v. Griffin*, 2 M. & W. 623; (x) *Barrow, Ex parte*, 6 Ch. D. 783.
Nicholson v. Bower, 1 Ell. & Ell. 173; (y) *Crawshay v. Eades*, 2 D. & R.
 28 L. J. Q. B. 97; *Heinekey v. Earle*, 288; *Oppenheim v. Russell*, 3 B. & P.
 8 Ell. & Bl. 428; 28 L. J. Q. B. 79; 42; *Richardson v. Goss*, ib. 119.
Bolton v. L. & Y. Ry. Co., L. R. 1 C.
 P. 431; 35 L. J. C. P. 137.

has no right to retake that which has arrived at its journey's end. His right of lien on the part stopped is revested, but no more." (z) It seems that the delivery of an essential part of a machine would operate as a delivery of the whole, so as to bar the right of stoppage *in transitu*. (a)

Notice, of Stoppage in Transitu. — The old rule of law, that a stoppage *in transitu* could be effected only by the corporeal touch of the goods, no longer prevails. (b) A notice to a carrier having charge of the goods is sufficient; but if given to an employer whose servant has the custody, it must be given at such a time, and under such circumstances, that the employer may be able to communicate it to his servant in time to prevent a delivery to the consignee. (c)

[* 965] *** Intervention of the Rights of Sub-Purchasers.** — If the purchaser resells the goods whilst they are *in transitu*, and receives the price, and then becomes insolvent, the first vendor may stop the goods at any time before they have come into the possession of such second purchaser, and hold them as a security for the due payment of the original purchase-money, unless the second purchaser claims as the *bona fide* indorsee and holder of a bill of lading. As between a vendor and his immediate vendee, a bill of lading may be countermanded, in case of the insolvency of the latter, at any time before it has been actually executed, like any other order or direction to a common carrier. But as between a first vendor and *bona fide* sub-purchasers, the case is different. The first vendor, by indorsing and delivering a bill of lading to his immediate purchaser, accredits the title of the latter to the goods, and holds him out to the mercantile world as the owner of them; and the *bona fide* indorsement and delivery by such purchaser of such bill of lading to a second purchaser, deprive the first vendor of all power and control over the goods, and destroy his right to stop *in transitu* as against the

(z) *Wentworth v. Outhwaite*, 10 M. & W. 452; *Tanner v. Scovell*, 14 M. & W. 35; *Valpy v. Oakeley*, 16 Q. B. 941; *Ex parte Chalmers, in re Edwards*, L. R. 8 Ch. 289; *Ex parte Cooper*, 11 Ch. D. 68 C. A.

(a) *Ex parte Cooper, supra*.

(b) *Mills v. Ball*, 2 B. & P. 457; *Litt v. Cowley*, 7 Taunt. 169; 2 Marsh. 457; *Hutchins v. Nunes*, 1 Moo. P. C. N. S. 243.

(c) *Whitehead v. Anderson*, 9 M. & W. 518.

latter. (d) If the assignee of the bill of lading, however, has given no value or consideration for the indorsement of such bill of lading, or if he knew of the insolvency of his vendor at the time he took the bill, he will be in no better situation than the latter. (e) It was held that a pre-existing debt was not such a consideration for the indorsement of a bill of lading as to defeat the right of the unpaid vendor to stop *in transitu*. (f) But this has been dissented from, and it has been held that it is immaterial that the consideration was past and not given at the time when the bill of lading was transferred. (g) A pledge of the bill of lading does not destroy the consignor's right of stoppage *in transitu* altogether; and he will be entitled to the surplus goods after satisfying the charge of the pledgee; (h) nor does the fact of the bill of lading being made out in the name of a sub-purchaser; (i) and although upon a resale the vendor loses his right of stoppage *in transitu* as to the goods themselves, yet, upon giving proper notice, he has a right to intercept so much of the sub-purchaser's money as has not yet been paid. (k)

* **Transfer by Bill of Lading** (see *ante*, p. * 935, Delivery [* 966] of Bill of Lading).—Goods will not pass to third parties by the mere delivery of a bill of lading without indorsement; and the operation of the bill may be qualified and restricted by a conditional indorsement. (l) The vendor may annex terms to the bill of lading preserving his control over the cargo and the *jus disponendi* of the goods on their arrival at their destination, although they may be shipped on board the purchaser's ship,

(d) *Lickbarrow v. Mason*, 6 East, 20 (a); 1 H. Bl. 357; *Gurney v. Behrend*, 23 L. J. Q. B. 265; 3 Ell. & Bl. 622; 1 Smith's Leading Cases, 459, 739; *Slubey v. Heyward*, 2 H. Bl. 504; see remarks of Bramwell, L. J., on this case in *Ex parte Falk*, 14 Ch. D. 455; *Caldwell v. Ball*, 1 T. R. 205; *Hibbert v. Carter*, ib. 745; *In re Westzinthus*, 5 B. & Ad. 817; *Jones v. Jones*, 8 M. & W. 431; *The Argentina*, L. R. 1 Ad. & Ec. 370; *Pease v. Gloahec*, L. R. 1 P. C. 219; *The Marie Louise*, L. R. 1 P. C. 219.

(e) *Waring v. Cox*, 1 Campb. 370; *Cuming v. Brown*, 9 East, 514.

(f) *Rodger v. Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393; 38 L. J. P. C. 30.

(g) *Leask v. Scott Brothers*, 2 Q. B. D. 376 (C. A.).

(h) *Spalding v. Ruding*, 6 Beav. 376; 15 L. J. Ch. 374.

(i) *Ex parte Golding, Davis, & Co.*, 13 Ch. D. 628.

(k) *Ex parte Falk*, 14 Ch. D. 446.

(l) *Akerman v. Humphrey*, 1 C. & P. 57; *Mitchell v. Ede*, 11 Ad. & E. 903; *Barrow v. Coles*, 3 Campb. 92.

and may be in the hands of the purchaser's shipmaster. (*m*) Cotton was consigned by the vendor to his agent at Liverpool, to whom a bill of lading and a bill of exchange drawn on the purchaser were also sent. The agent sent the bill of exchange to the purchaser, who accepted it, and then the agent sent him the bill of lading. The purchaser indorsed the bill of lading and sent it to a railway manager, who paid the sea freight, and took possession of the cotton, and sent it to the purchaser at Luddenden Foot. The invoice sent to the purchaser described the cotton as "shipped by the vendor to Liverpool, consigned to order for account and risk of the purchaser, Luddenden Foot." The bill of lading provided for shipment into Liverpool, there to be delivered to order or assigns, he or they paying freight immediately on landing. It was held that the *transitus* prescribed by the vendor ended at Liverpool, and that after the cotton had been delivered there to the railway company as agents for the purchaser, the vendor had no right to stop it *in transitu*. (*n*) Every consignee (*o*) of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods mentioned therein passes, has transferred to him all such rights of action and suit, and is subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself; (*p*) and every bill of lading representing goods to have been shipped on board is conclusive against the master or person signing the same in the absence of fraud on the part of the shipper or holder. (*q*) As to the negotiability and assignments of bills of lading, see Addison on Torts (5th ed., by Cave), p. 433.

Of the Vendor's Power of Resale after a Stoppage in Transitu.—If a specific, ascertained chattel has been sold [* 967] by a properly * authenticated contract, so that the

(*m*) *Turner v. Trustees Liverpool Dock*, 6 Exch. 569; *Van Casteel v. Booker*, 2 Exch. 708; *Jenkyns v. Brown*, 14 Q. B. 503; *Gabarron v. Kreeft*, L. R. 10 Ex. 274; *Ex parte Rosevear Clay Co.*, 11 Ch. D. 560. such, although he has parted with the beneficial interest in the goods. See *Fowler v. Knoop*, 4 Q. B. D. 299.

(*n*) *Ex parte Gibbes*, 1 Ch. D. 101.

(*o*) A "consignee" continues to be

(*p*) 18 & 19 Vict. c. 111, sects. 1, 3; *The Figlia Maggiore*, L. R. 2 Ad. & E. 106; 37 L. J. Adm. 52.

(*q*) *Meyer v. Dresser*, 33 L. J. C. P. 289.

right of property has passed to the purchaser, the exercise of the right of stoppage *in transitu* will not at once have the effect of revesting the right of property in the vendor. (r) The assignees of the bankrupt purchaser are entitled to call upon the vendor to deliver the goods on being paid or tendered the price; but if they refuse to take and pay for the goods, the vendor will be entitled to resell them in the same way that he is entitled to resell in ordinary cases after the refusal of a purchaser to take and pay for the things he has ordered and bought (*ante*, p. * 956). If the sale is a sale of things of quantity generally, and the vendor will fulfil his contract by delivering any articles of the character and description mentioned in the contract, the vendor may, after he has recovered possession of the goods by the exercise of the right of stoppage, resell them; (s) but he may be obliged to furnish other goods of a similar character and description to those originally bargained for, on tender of the price by the assignees.

Sale of Goods to One of Several Partners in Trade — Dealings by One Partner in Fraud of the Firm. — A sale of goods of the same description as those ordinarily dealt in by the firm in the exercise of its trade to one of the partners who is known by the vendor, at the time of the sale, to be a member of the co-partnership, and is presumed by him to be dealing on account of the firm, is a sale to the firm at large, with whatever view the goods may have been bought by such single partner, and to whatever purposes they may subsequently be applied by him; and all the members of the firm, consequently, are liable for the payment of the price of them. (t) But if the goods are not of the same character and description as those dealt in by the partnership in the way of its trade, and are not forwarded by the vendor to the place of business of the partnership, but to the private dwelling of the partner giving the order, and the goods have not reached the hands of the partnership, but have been appropriated to the private use of the partner ordering them, the vendor cannot then look to the firm for payment. (u) If an acceptance of

(r) *Martindale v. Smith*, 1 Q. B. 395.(t) *Bond v. Gibson*, 1 Campb. 185.(s) *Clay v. Harrison*, 10 B. & C. 106.(u) *Story on Partnership*, sect. 112.

a bill of exchange is given by one partner in his own name for goods supplied to the firm, and the partner giving the acceptance becomes bankrupt, and a portion of the amount of the bill is realized from his estate, the drawer may proceed against the other members of the firm, or against the partnership estate, for the balance due to him. (x)

Parties secretly interested in the Subsequent Disposition of * Goods purchased by One of Them on his own individual credit are not necessarily liable for the payment of the price of them. Thus where three parties agreed to bring out and publish a periodical, called the *Sporting Review*, on their joint account, upon the terms that one of them, who was an author, was to write the book, and furnish manuscript and drawings, and another, who was a printer, was to furnish the paper for the work, and to charge it to the account at cost price, and was also to charge the printing at "master's prices," and the third, who was a publisher, was to publish the work, make and receive general payments, keep the accounts, and divide the profits between the three, and the printer ordered paper for the work, but became bankrupt before he had paid for it, whereupon the stationer sought to recover the price from the other two, — it was held that they were not liable, as, it was bought upon the individual credit of the printer. (y) Generally speaking, however, where goods are obtained for the joint use and benefit of several persons with their authority, they are all responsible as the real principals in the transaction, so that the full value of the goods may be recovered from any one of them, although they were purchased on the credit of the ostensible buyer alone. Where a publisher gave an order to a stationer to deliver to the defendant, who was a printer, "two hundred reams of super-royal paper for Jeremy Taylor's works, and seventy-two reams for Doddridge's *Expositor*," and the paper was delivered at the printer's office, and it was afterward discovered that the printer was at the time of the giving of the order a partner with the

(x) *Bottomley v. Nuttall*, 5 C. B. n. s. 141; 28 L. J. C. P. 110; *Keay v. Fenwick*, 1 C. P. D. 745. (y) *Wilson v. Whitehead*, 10 M. & W. 503.

publisher in both the works mentioned in the order, it was held that he was liable, together with the publisher, for the price of the paper. (z)

Sub-Purchasers of Separate Shares of Goods sold. — Where parties are not jointly interested in the disposal of goods when purchased, they cannot be sued jointly, and one cannot be made to pay the price of the whole, but each is separately responsible for his own separate share only of the things so bought. (a) Where three persons agreed amongst themselves to purchase jointly a quantity of oil on speculation, and Eyre, one of their number, was to go into the market and be the ostensible buyer, and the others were to share in the purchase at the same price which he might give, and Eyre accordingly bought the oil, but never paid for it, it was held that the other two persons could not be sued jointly with him as his secret partners in the transaction, that the agreement was a sub-contract to share severally in certain proportions * in the purchase to be [* 969 made by the ostensible buyer on his own credit, and that the failure of such buyer to pay the price did not render the two other sub-contractors responsible for the price of the whole bargain. (b)

Sale of Goods to Registered Joint-Stock Companies. — A vendor who seeks to make a registered joint-stock company responsible for the payment of the price of goods delivered at the offices or ordinary place of business of the company, pursuant to the orders of officers of the company apparently intrusted with the management of the business of the company, is not confined to proving his case by the articles of association or the authorized regulations of the company; he may show that the whole of the shareholders have by usage or otherwise sanctioned contracts not sanctioned thereby. If the company has been in the habit of intrusting one director, or any public officer, or any shareholder, or other party, with the duty of ordering goods required by the company in the exercise of its trade, or for carrying out the purposes for which it was registered, and has been in the habit of paying for goods supplied pursuant to the

(z) *Gardiner v. Childs*, 8 C. & P. 345.

(b) *Coope v. Eyre*, 1 H. Bl. 37.

(a) *Hoare v. Dawes*, 1 Doug. 372.

orders of such director, officer, or other party, the company will be responsible for the payment of the goods so ordered, whether that particular course of dealing is or is not sanctioned or authorized by the articles of association; for although they point out the mode in which the directors are to exercise their functions, and by which the company may be bound, yet the articles do not prevent them from binding themselves in some other way, and from appointing an agent and recognizing his contracts, and rendering themselves responsible as principals under the ordinary law of principal and agent.

Of the Promise or Warranty implied from a Vendor that he does not at the Time he sells, know that he has no Title or Right to sell. — In Noy's Maxims it seems to be affirmed to be a principle of law that, if a man steals a horse and sells it on credit, and the owner takes it away from the purchaser before the price is paid, the thief may nevertheless sue the purchaser for the price. "If I take," it is said, "the horse of another man and sell him, and the owner take him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse, *et caveat emptor*." (c) Such a proposition never could have been the settled law of this country. There are several ancient authorities opposed to it; and all the modern decisions in our courts of justice are quite at variance with such a doctrine. It has always been held that, if a man sells a chattel,

knowing it to be the property of another, and the purchaser is evicted, the vendor * cannot maintain an action for the price; and if the price has been paid over to him, the purchaser is entitled to maintain an action to recover it back. (d) If goods are sold by a person who is not the owner, and the owner is found out and paid for the goods, the vendor who sold them cannot then call upon the purchaser for payment. (e) "If a man takes the goods of S tortiously, and sells them to me for money as his own goods, and afterward S takes them away from me, I may have an action on the case against my vendor." "If the vendor affirm that the goods are the goods

(c) Noy's Maxims, 209, p. 89.

(e) Dickenson v. Naul, 4 B. & Ad.

(d) Furnis v. Leicester, Cro. Jac. 638; Allen v. Hopkins, 13 M. & W. 474; Peto v. Blades, 5 Taunt. 657.

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of a stranger, his friend, and that he had authority from him to sell them, and upon that B buy them, when in truth they are the goods of another, yet, if he sell them fraudulently and falsely on this pretence of authority, though he do not warrant them, and though it be not averred that he sold them knowing them to be the goods of the stranger, B shall have an action for this deceit." (*f*) By the civil law, if the vendor knowingly sold a thing belonging to another person, the purchaser might sue for the recovery of damages without waiting for an eviction. (*g*)

Warranty of Title.¹—"Where one having the possession of any personal chattel, sells it, the bare affirming it to be his, amounts

¹ The American decisions fully uphold the distinction stated in the text, and lay down the rule that as to goods in the vendor's possession, there is an implied warranty of title. *Williamson v. Sammons*, 34 Ala. 691; *Gross v. Kierski*, 41 Cal. 111; *Morris v. Thompson*, 85 Ill. 16; *Marshall v. Duke*, 51 Ind. 62; *Hackleman v. Harrison*, 50 Ind. 156; *Rice v. Forsyth*, 41 Md. 389; *Bennett v. Bartlett*, 6 Cush. 225; *Whitney v. Heywood*, ib. 82; *Burt v. Dewey*, 40 N. Y. 483; *Case v. Hall*, 24 Wend. 102; *Dorr v. Fisher*, 1 Cush. 273; *Ricks v. Dillahunt*, 8 Port. 133; *Sargent v. Carrier*, 49 N. H. 310; *Storm v. Smith*, 43 Miss. 497; *Whitaker v. Eastwick*, 75 Pa. St. 229; *Gookin v. Graham*, 5 Humph. 484; *Scott v. Scott*, 2 A. K. Marsh. 215; *McCoy v. Archer*, 3 Barb. 323; *Sweet v. Colgate*, 20 Johns. 196; *Rew v. Barber*, 3 Cow. 272; *Vibbard v. Johnson*, 19 Johns. 77; *McKnight v. Devlin*, 52 N. Y. 399; *Hoe v. Sanborn*, 21 N. Y. 552; *Thurston v. Spratt*, 52 Me. 202; *Huntingdon v. Hall*, 36 Me. 501; *McCabe v. Moorehead*, 1 Watts & S. 513; *Payne v. Rodden*, 4 Bibb, 304; *Cozzins v. Whitaker*, 3 Stew. & P. 322; *Inge v. Bond*, 3 Hawks, 101; *Mockbee v. Gardner*, 2 Har. & G. 176; *Bucknam v. Goddard*, 21 Pick. 71; *Darst v. Brockway*, 11 Ohio, 462; *Lines v. Smith*, 4 Fla. 47; *Chancellor v. Wiggins*, 4 B. Mon. 201; *Colcock v. Goode*, 3 McCord, 513. The rule applies upon an exchange as well as in a sale for money. *Hunt v. Hackett*, 31 Mich. 18; *Patee v. Pelton*, 48 Vt. 182; *Byrnside v. Burdett*, 15 W. Va. 702.

There is no implied warranty of title, if the goods are in the possession of a third party at the time of the sale (*Dresser v. Ainsworth*, 9 Barb. 619; *Edick v. Crim*, 10 Barb. 445; *Long v. Hickingbottom*, 28 Miss. 772; *Andres v. Lee*, 1 Dev. & B. Eq. 318; *Pratt v. Philbrook*, 33 Me. 17; *Scranton v. Clark*, 39 N. Y. 220; *Fletcher v. Drath*, 66 Mo. 126; *Stephens v. Ellis*, 65 Mo. 456); nor in a sale by executors, administrators, or other trustees (*Blood v. French*, 9 Gray, 197; *Brigham v. Maxcy*, 15 Ill. 295; *Mockbee v. Gardner*, 2 Har. & G. 176; *Prescott v. Holmes*, 7 Rich. Eq. 9; *Forsyth v. Ellis*, 4 J. J. Marsh. 298; *Ricks v. Dillahunt*, 8 Port. 133).

Neither is there any implied warranty in sales by officers of the law. *Baker v. Arnot*, 67 N. Y. 448; *Fore v. McKenzie*, 58 Ala. 115; *Worthy v. Johnson*, 8 Ga. 236; *Neal v. Gillaspy*, 56 Ind. 451; *Brunner v. Brennan*, 49 Ind. 98; *State v.*

(*f*) 1 Rolle, Abr. 90, pl. 5; 91, pl. 7; see *Pasley v. Freeman*, 3 T. R. 59. catur, utiliter me ex empto acturum putavit in id, quanti mea interest meam

(*g*) "Si sciens alienam rem ignoranti mihi vendideris, etiam priusquam evin- case factam." — *Dig. lib. 19, tit. 1, lex 30, sect. 1.*

to a warranty of the fact, and an action lies on the affirmation; for his having possession is a color of title, and perhaps no other title can be made out. *Aliter*, where the seller is out of possession; for then there may be room to question the seller's title; and *caveat emptor* in such a case to have either an express warranty or a good title." (h) "This distinction by Holt," observes Buller, J., "is not mentioned by Lord Raymond, who reports the same case; and if an affirmation at the time of sale be a warranty, I cannot perceive a distinction between the vendor's being in or out of possession. The thing is bought of him in consequence of his assertion; and if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on." (i)

Implied Warranties of Title on the Part of Persons who sell as Owners. — Wherever a man sells goods *as owner*, he [* 971] impliedly * undertakes and promises that the goods are his own goods, and that he has a right to make the sale and transfer he professes to make; and if he was not the owner at the time of the sale, and was not selling his own goods, but the goods of a third party, who subsequently claims them and deprives the purchaser of them, he is responsible in damages for the breach of such implied undertaking. (k) "By the civil law," observes Blackstone, "an implied warranty was annexed to every sale in respect of the title of the vendor; and so, too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own and the title proves deficient, without any express warranty for that purpose." (l) Such is the case in the Roman law, (m) the French

Prime, 54 Ind. 450; Harrison v. Shanks, 13 Bush, 620; Hensley v. Baker, 10 Mo. 157; Davis v. Hunt, 2 Bailey, 412; Yates v. Bond, 2 McCord, 382; Bostwick v. Winton, 1 Sneed, 525; Bashore v. Whisler, 3 Watts, 490; Stone v. Pointer, 5 Munf. 287; Hicks v. Skinner, 71 N. C. 539.

(h) Medina v. Stoughton, 1 Salk. n. s. 708; 34 L. J. C. P. 105; and see 210; Crosse v. Gardner, Carth. 90; Adamson v. Jarvis, 4 Bing. 73; Harding v. Freeman, Sty. 310; Rosewell v. Vaughan, Cro. Jac. 197. the French Cod. Civ. Art. 1599; Trolong, c. 3.

(i) Pasley v. Freeman, 3 T. R. 58.

(k) Eichholz v. Bannister, 17 C. B.

(l) 2 Bl. Com. 451; 2 Kent's Com. 478; 2 Stephen's Com. 126.

(m) Cod. lib. 8, tit. 45; Dig. lib. 21, tit. 2.

law, (*n*) the Scotch law, and all the various systems of jurisprudence founded on the Roman code; and this, too, is the case in the American law, founded on the principles of our own common law. (*o*) It has been decided by the Court of Exchequer that the law does not imply from the mere fact of the sale of a specific chattel any undertaking or warranty from the vendor that he is the owner of, or has a good title to, the thing he sells. (*p*) But the Court of Queen's Bench has held that, whenever a man sells goods generally, and not in any particular character or capacity, such as auctioneer, agent, sheriff, pawnbroker, pledgee, &c., he must be taken to sell as owner. (*q*) The purchaser, however, takes the chattel, as a general rule, subject to what may turn out to be flaws in the title. (*r*) Where the vendor sells "with all faults," and says he will give no warranty, and does nothing to conceal defects, he will be relieved from liability; but it seems that if he says he believes the article to be free from objection, and knew the reverse, there might be ground for an action of deceit. (*s*)

Sales by Sheriffs, Agents, Trustees, or Persons assuming to sell in Some Special Character or Capacity, and not as Owners¹—**Caveat Emptor.**—Whenever a man does not sell goods as owner, but in some special character or capacity, and the purchaser has notice thereof, he is bound to look into the title * of his vendor; for there is not, under such circum- [* 972] stances, any implied warranty of title on the part of the vendor. (*t*) The latter merely undertakes and promises that he does not, at the time he sells, know of any defect in his authority or title to sell; and he cannot be made responsible for

¹ See *ante*, p. * 970, American note.

(*n*) Cod. Civ. Art. 1626; Troplong, c. 4, *De la Vente*.

(*o*) *Armstrong v. Percy*, 5 Wend. 535; *Blasdale v. Babcock*, 1 J. R. 517; *Sedgwick on Damages*, 2d ed. 293; 2 *Kent's Com.* 478.

(*p*) *Morley v. Attenborough*, 3 Exch. 500; 18 L. J. Ex. 151.

(*q*) *Lee, C. J.*, commenting on the case of *L'Apostre v. La Plastrier* (cited

in *Ryall v. Rowles*, 1 Ves. Sen. 351); *Simms v. Marryat*, 20 L. J. Q. B. 458.

(*r*) *Cundy v. Lindsay*, 3 Ap. Cas. p. 459; see this case, and sales in market overt, &c., in *Addison on Torts*, 5th ed. p. 415.

(*s*) *Ward v. Hobbs*, 4 Ap. Cas. 13; see *post*, p. * 996.

(*t*) *Bagueley v. Hawley*, L. R. 2 C. P. 625; 36 L. J. C. P. 328.

the repayment of the purchase-money, unless it can be proved that he knew he had no right or title to sell, and that, consequently, his conduct was fraudulent. Thus in the case of sales by sheriffs of goods and chattels taken in execution, the sheriff does not impliedly warrant his title to sell, or warrant the purchaser against eviction; he merely promises that he does not, at the time he sells, know of any defect in his authority, or that he has no right or title to sell. (u) So in the case of sales by pawnbrokers of unredeemed pledges, the pawnbroker only warrants the subject-matter of the sale to be a pledge, the time for the redemption of which has expired. He does not warrant or promise that the pledgor had a title to pledge the article, nor does he impliedly warrant the purchaser against eviction. As he has sold in a special character or capacity, he impliedly sells and agrees to transfer his own title and interest in the subject-matter of the sale, and no more; and that being so, it is the duty of the purchaser to inquire into the title; and if he neglects so to do, and it subsequently appears that the pledgor had no title to pledge nor the pawnbroker to sell, and the purchaser is evicted, he cannot recover compensation for his loss, unless he can establish a case of fraud. (x)

Sale by a Vendor of such a Title and Interest as he actually possesses. — A distinction has been made in some cases between a sale by a person who is in possession of the goods he sells, and by a person who is out of possession, and sells merely his right or title to goods which are in the possession of a third party. Thus it is said that, if a man sells a horse, whereof another is possessed, without any covenant or warranty for the enjoyment, it is at the peril of him who buys; and the latter shall have no action at law for the recovery of his money, because he might have protected himself by the contract. (y) This is undoubtedly the case if the possession of the third party is an adverse possession, and the title is disputed, and the vendor merely sells all the title and interest he possesses, submitting that title to the scrutiny or investigation of the purchaser (*ante*, pp. * 907—* 915).

(u) *Chapman v. Spiller*, 14 Q. B. 621.

(x) *Morley v. Attenborough*, 3 Exch. 500; 18 L. J. Ex. 151.

(y) *Ante*, p. * 970.

But if a man sells a thing in the hands of a third party absolutely as owner, and receives the full value for it, he impliedly undertakes to put the purchaser into *possession of the subject-matter of the sale. (z) By the civil law, the vendor of rights to movables in the possession of third parties, and of rights of action, impliedly warranted that he had the right or title which he pretended to sell or transfer; and if he had no such right, the sale was void, and he might be compelled to refund the money he had received, and make good the damages sustained by the purchaser. (a) The vendor of a debt impliedly warranted that the debt was due to him, but not the solvency of the debtor. (b) If the purchaser of a chattel, who had been sued and evicted for want of title, neglected to give notice to the vendor of the action brought against him, or if he allowed judgment to go against him by default, or defended himself negligently, or consented to a reference without the knowledge of the vendor, he was not permitted to proceed against the latter upon the warranty, as the eviction might have resulted from his own negligence. (c) But where the purchaser, at the time of the making of the contract, is afforded the means of inspection and examination, there is no implied warranty on the part of the vendor of the peculiar character, quality, or condition of the thing sold. The purchaser must judge for himself; and the maxim of *caveat emptor* applies. (d) Where, however, goods are sold under a certain denomination, the buyer is entitled to have such goods delivered to him as are commercially known under this denomination, though he may have bought after inspection of the bulk and without warranty. (e)

Warranties made pending a Negotiation for the Sale of Property. — “As to selling with a warranty,” observes Holt, C. J., “that will be so, though the warranty be before the sale; as if, upon a treaty about the buying of certain goods, the buyer should ask the seller if he would warrant them to be of such

(z) *Coe v. Clay*, 5 Bing. 440; 3 Moo. lib. 8, tit. 45; Domat, liv. 1, tit. 2, sects. 11, 21. & P. 59.

(a) Dig. lib. 18, tit. 4; Cod. lib. 4, tit. 3. (d) *Hall v. Conder*, 2 C. B. n. s. 41.

(b) Dig. lib. 18, tit. 4, lex 4.

(e) *Josling v. Kingsford*, 13 C. B. n. s. 447; 32 L. J. C. P. 94.

(c) Dig. 21, tit. 2, l. 51, 53, 56; Cod.

a value, and to be his own goods, and the seller should warrant them, and then the buyer should demand, and the seller set the price, and then the buyer should take time to consider for two or three days, and then should come and give the seller his price; though the warranty here was before the sale, yet this will be well, because the warranty is the ground of the treaty, and this is selling with a warranty. But it is otherwise if the warranty be after the sale; as if a man sells goods and afterward warrants them, such warranty is not good. But in the other case the warranty is part of the contract." (f)

[* 974] * **Private Representations made prior to a Sale by Auction forming no Part of the Public Contract of Sale.**

— If what passes between a vendor and purchaser forms no part of the negotiation ending in the purchase, it cannot be treated as a warranty. Thus in the case of a sale by auction, you cannot "tack on a previous private communication to what is said by the auctioneer at the time of the actual public sale, in order to constitute a warranty. To permit such a practice," observes Maule, J., "would be to encourage a fraud upon all others attending the sale." If, therefore, a horse is advertised to be sold by auction without a warranty, and the owner privately represents the horse to be sound and free from vice, to a person who attends the sale, and bids for and purchases the horse in reliance on the representation, the representation cannot be treated as a warranty. Those who bid at a public auction bid against each other on the supposition that they all stand upon an equal footing; and if the sale is announced and conducted as a sale without a warranty, and the biddings are made upon that understanding, any secret underhand bargain for a warranty would be a fraud. (g)

Implied Warranty where Nothing is said respecting Quantity or Quality — Caveat Emptor. — The law does not imply from the mere seller of an article in its natural state, who has no better means of information than the purchaser, — as, for instance, where the goods are in existence and can be inspected by the buyer, (h)

(f) *Lysney v. Selby*, 2 *Ld. Raym.* 1120; 1 *Salk.* 211; *Roscorla v. Thomas*, 3 *Q. B.* 236.

(g) *Hopkins v. Tanqueray*, 15 *C. B.* 130; 23 *L. J. C. P.* 162.

(h) *Jones v. Just*, *L. R.* 3 *Q. B.* 197; 37 *L. J. Q. B.* 89.

and who does not affirm that the article is fit for any particular purpose, — any warranty or undertaking beyond the ordinary promise, that he makes no false representation calculated to deceive the purchaser, and practises no deceit or fraudulent concealment, and that he is not cognizant of any latent defect materially affecting the marketable value of the goods. (i) “In the general sale of a horse, the seller only warrants it to be an animal of the description it appears to be, and nothing more; and if the purchaser makes no inquiries as to its soundness or qualities, and it turns out to be unsound and restive, or unfit for use, he cannot recover as against the seller, as it must be assumed that he purchased the animal at a cheaper rate.” So on the sale and transfer of wares and merchandise, if nothing is said as to the character or quality of the thing sold, the buyer takes the risk of all latent defects unknown to the seller at the time of the execution of the contract of sale; all that the seller answers for, being that the article is, as far as he knows, what it appears to be. Where the plaintiff bought a quantity * of hops of [* 975] the defendant, who was not the grower, by sample taken from the pockets, and at the time of the sale the bulk fairly answered to the sample, and no inherent defect was perceptible or known to the defendant, the vendor; but the grower, in order to increase the weight of the hops, had fraudulently watered them after they were dried, and the effect of a proceeding of this kind did not usually become perceptible for several months, and was not known to the defendant at the time he sold the hops, but became manifest in a few months after the sale, whilst the hops remained in the plaintiff's possession, and rendered them unsalable, — it was held that there was no implied warranty on the part of the defendant that the hops were good, sound, and merchantable at the time he sold them, and that, as the defendant had acted *bona fide*, he was not answerable for the loss. (k)

(i) *Bluett v. Osborn*, 1 Stark. 384.
 (k) *Parkinson v. Lee*, 2 East, 314;
Emmerton v. Matthews, *post*, p. * 978.
 The sale of hops is regulated by the 54
 Geo. III. c. 123, and the 29 Vict. c. 37.
 By sect. 18 of the last-named act, every
 person who shall sell any hops in any

bag or pocket having marked thereon
 any name, description, date, trade-mark,
 or symbol intended to indicate the
 name of the person by whom, or the par-
 ish, county, or place where, or the year
 when, the said hops were grown, shall be
 deemed to contract that the said descrip-

Where a contract was made with reference to a specified ship, it was held that there was no implied warranty of fitness. (*l*)

Warranty of Merchantable Quality.¹— Under a contract to supply goods of a specified description, which the buyer has no

¹ The law is the same in this country. *McClung v. Kelley*, 21 Iowa, 508; *Hyatt v. Boyle*, 5 Gill & J. 110; *Magee v. Street*, 1 Allen (N. B.) 242; *Gaylord Manuf. Co. v. Allen*, 53 N. Y. 518; *Gallagher v. Waring*, 9 Wend. 20; *Hamilton v. Gan-yard*, 3 Keyes, 45; *Hanks v. McKee*, 2 Litt. 227; *Moorehouse v. Comstock*, 42 Wis. 626; *Merriam v. Field*, 24 Wis. 640; *Boyd v. Wilson*, 83 Pa. St. 319; *Salisbury v. Stainer*, 19 Wend. 159; *Oneida Manuf. Co. v. Lawrence*, 4 Cow. 444. And the term merchantable must be construed with reference to the purpose for which the article is ordered. *Brenton v. Davis*, 8 Blackf. 317; *Chicago Packing, &c. Co. v. Tilton*, 87 Ill. 547; *Weiger v. Gould*, 86 Ill. 180; *Howard v. Hoey*, 23 Wend. 250; *Moses v. Mead*, 1 Den. 378; *Leflore v. Justice*, 1 Smed. & M. Ch. 381; *Misner v. Granger*, 6 Ill. 69; *Whitmore v. South Boston Iron Co.*, 2 Allen, 58; *Rodgers v. Niles*, 11 Ohio St. 48; *Getty v. Roundtree*, 2 Chand. 28; *Dickson v. Jordan*, 11 Ired. L. 166; *Bartlett v. Hoppock*, 34 N. Y. 118; *Rice v. Forsyth*, 41 Md. 389; *Murray v. Smith*, 4 Daly, 277; *Sims v. Howell*, 49 Ga. 620; *Howie v. Rea*, 70 N. C. 559; *Wilcox v. Hall*, 53 Ga. 635; *Spurr v. Albert M. Co.*, 2 Hannay (N. B.) 361; *Gerst v. Jones*, 32 Gratt. 518; *Robson v. Miller*, 12 S. C. 586; *Harris v. Waite*, 51 Vt. 480; *Brown v. Sayles*, 27 Vt. 227; *Beals v. Olmstead*, 24 Vt. 114; *Walton v. Cody*, 1 Wis. 420; *Leopold v. Van Kirk*, 27 Wis. 152; *Pease v. Sabin*, 38 Vt. 432.

See exceptions to the rule *caveat emptor* considered, in an article, 18 Alb. L. J. 324.

The burden of proof is upon a party setting up a warranty of personal property, and suing for a breach of it (*Milk v. Moore*, 39 Ill. 584; *Don v. Fisher*, 1 Cush. 271), though the plaintiff need not prove the return of the thing bought (*Toris v. Long*, 1 Tayl. 17). Thus where there is a warranty of soundness, and the action is brought for a breach thereof, proof of the warranty is indispensable, and it is immaterial whether the defendant knew of the unsoundness or not (*Bartholomew v. Bushnell*, 20 Conn. 271); but if the action be brought not for a breach of warranty, but for fraud in the sale, by representations which the defendant knew to be false, such knowledge is an essential ingredient in the fraud, and must be proved (*ib.*; compare *House v. Fort*, 4 Blackf. 293; *Massie v. Crawford*, 3 T. B. Mon. 218; *Tipton v. Triplett*, 1 Met. (Ky.) 570; *McLeod v. Tutt*, 2 Miss. 288; *Ross v. Mather*, 47 Barb. 582; *Vanleer v. Earle*, 26 Pa. St. 277). If the action concerns the soundness of a horse, the plaintiff must prove an express warranty before or at the time of the sale; representations as to quality at the sale are warranties (*Burton v. Young*, 5 Harr. 233; *Miller v. McDonald*, 13 Wis. 673); or if plaintiff contracts to deliver a certain quantity of sound rice, the burden is upon him to show that the rice was sound (*Ruiz v. Norton*, 4 Cal. 355); or where a machine sold is found not to work well, the burden of proof is upon the vendor to rebut the *prima facie* presumption that the fault is in the machine, and not in the

tion, date, trade-mark, and symbol c. 134, repealed, and the 54 Geo. III. were genuine and true, and that such c. 123).
description, date, trade-mark, and symbol (*l*) *Robertson v. Amazon Tug Co.*, 7 Q. B. D. 598.
were in accordance with that and the
therein recited acts (the 48 Geo. III.

opportunity of inspecting, the goods must not only, in fact, answer the specific description, but must be salable or merchantable under that description. The maxim *caveat emptor* does not apply to a sale of goods when the buyer has no opportunity of inspection. (*m*)

When goods are sold by sample under circumstances in which, in the absence of a sample, there would have been an implied warranty that they were merchantable, such warranty is excluded only with respect to such matters as can be judged of by the sample. Where manufacturers contracted to supply to the plaintiffs a quantity of gray shirtings according to sample, each piece to weigh seven pounds, and goods according to sample and of the agreed weight were delivered and accepted, but it was afterward discovered that the weight was made up by introducing into the fabric 15 per cent of china clay, which made the goods unmerchantable, but which could not have been discovered by an ordinary examination of the sample, it was held that the implied warranty of merchantable quality was not excluded. (*n*)

*** Implied Warranty where the Article is sold to be [* 976]**
used for a Specific Purpose.¹ — If the vendor is informed

buyer and user (*Parker v. Hendrie*, 3 Iowa, 263); but where the commodity is by its nature subject to change or deterioration, and no fraud or concealment is shown, the buyer, to make out a breach of warranty, must prove that the defect or deterioration existed at the date of the sale, or show that it was discovered as early as it was practicable to make an examination (*Hall v. Plassan*, 19 La. Ann. 11). Although a person may maintain an action on an implied warranty of soundness, where there is an express warranty of title only, yet he must produce the deed as evidence of the sale, and to prove that there is no express covenant contrary to the implied warranty on which his action is brought (*Allen v. Potter*, 2 McCord, 323); so, also, to entitle one to recover the price of personal property alleged to have been sold and delivered, proof of an actual sale and delivery is necessary, not merely of an agreement to sell and deliver (*Brink v. Chicago, &c. R. R. Co.*, 23 Iowa, 473; *Edmunds v. Wiggin*, 24 Me. 505). Where an action is founded on a joint contract of sale, laid in the declaration, the joint contract is essential to the joint warranty of sale, and requires strict proof, in whatever form of action the plaintiff may sue. *Stockfleet v. Fryer*, 2 Strobb. 301.

¹ The distinction seems to be that where a specified article is ordered of a manufacturer or dealer, although stated to be required for a particular purpose, and the specified article is actually furnished, there is no implied warranty that it shall

(*m*) *Jones v. Just*, *ante*, p. * 974.

(*n*) *Mody v. Gregson*, L. R. 4 Ex. 49; 38 L. J. Ex. 12.

that an article of a certain quality, character, or description, suited for some specified purpose, is required, the law implies a promise from him that he will supply to the purchaser an article of the quality, character, or description ordered, and reasonably fit for the purpose for which it is required. Where the plaintiff sent to the shop of the defendant, who was a rope-dealer, for a crane-rope, and the defendant's foreman went to the plaintiff's premises and took the necessary admeasurement, saw the crane, and was told that the rope was wanted for the purpose of raising pipes of wine, and the rope was brought and fixed, but it broke, and a cask of wine was precipitated into the street, and wholly lost, it was held that the defendant, by accepting the retainer and employment under the circumstances, had impliedly undertaken to furnish a rope reasonably fit for the purpose for which it was ordered, and was liable for the damage occasioned by its breaking, although he was not in fact the maker or manufacturer of it, he having employed a ropemaker to execute the order, and the latter having, in his turn, employed a third manufacturer of ropes for the purpose. (o) This warranty is of a general character, and includes latent defects. (p) So the law implies a promise or undertaking from a manufacturer that all goods manufactured and sold by him for a specific purpose, and to be used in a particular way, are reasonably fit and proper for the purpose for which he professes to make them, and for which they are known to be required. Thus where a tradesman manufactured and

answer that particular purpose, except in cases where the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer. *Chicago Packing Co. v. Tilton*, 87 Ill. 547; *Robinson Machine Works v. Chandler*, 56 Ind. 575; *White v. Miller*, 71 N. Y. 118; *Wright v. Hart*, 18 Wend. 449; *Hargous v. Stone*, 5 N. Y. 73; *Ballou v. Parsons*, 11 Hun, 602; *Deming v. Foster*, 42 N. H. 165; *Pease v. Sabin*, 38 Vt. 432; *Mason v. Chappell*, 15 Gratt. 572; *Gerst v. Jones*, 32 Gratt. 518; *Pacific Iron Works v. Newhall*, 34 Conn. 67; *Brown v. Murphee*, 31 Miss. 91; *Rodgers v. Niles*, 11 Ohio St. 48; *Wolcott v. Mount*, 36 N. J. L. 262; s. c. 38 N. J. L. 496; *Port Carbon Iron Co. v. Groves*, 68 Pa. St. 149; *Tilton Safe Co. v. Tisdale*, 48 Vt. 83; *Morrow v. Waterous Engine Co.*, 2 Pugs. & B. (N. B.) 509; *Chisholm v. Proudfoot*, 15 U. C. Q. B. 203; *Bunnel v. Whittaw*, 14 U. C. Q. B. 241; *Colton v. Good*, 11 U. C. Q. B. 153; *Grant v. Cadwell*, 8 U. C. Q. B. 161.

(o) *Brown v. Edgington*, 2 Sc. N. R. 496; and see *Bigge v. Parkinson*, 7 H. & N. 955; 31 L. J. Ex. 301.

(p) *Randall v. Newsom*, 2 Q. B. D. 102. The doctrine of *Readhead v. The Midland Ry.* does not apply.

sold copper sheathing for vessels, it was held that he impliedly warranted and undertook that the copper he manufactured was reasonably fit for the purpose of sheathing vessels; (*q*) and it would seem, indeed, that the mere seller of copper described as fit for sheathing vessels would be presumed to have a reasonable knowledge of the article so described and sold, and that the law would imply a warranty that the article was reasonably fit for the purpose specified. (*r*) But when a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, yet if the known, described, and defined thing is actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. Thus where a manufacturer invented and sold a "smoke-consuming furnace," and the defendant ordered it for his brewery, it * was held that the law [* 977] would imply no warranty that the machine was fit for the defendant's brewing-copper, and that the utmost that the vendor could be considered to undertake under such circumstances was, that the machine would consume smoke, which it appeared to have done in other instances when applied to a different purpose. "But," observes Lord Abinger, "if the vendor had said, 'I will send you one of my smoke-consuming furnaces which will suit *your brewery*,' in such a case that would be a warranty that it should suit the brewery." (*s*) In an action for the price of a printing-machine, it appeared that the plaintiff had obtained a patent for a machine of which he was the inventor, which he called "Oliphant's patent two-colored printing-machine," the object of which was to print calico of two colors; that the defendant, hearing of the invention, wrote to the plaintiff to know the price; when the latter, in reply, said, "I undertake to make you a two-color printing-machine on my patent principle;" whereupon the defendant ordered the machine, but could not make it print two colors, and therefore refused to pay the price. But it was held that, as the defendant had got a

(*q*) *Jones v. Bright*, 3 Moo. & P. 155; 5 Bing. 533.

(*r*) *Gray v. Cox*, 6 D. & R. 208; 4 B. & C. 108.

(*s*) *Chanter v. Hopkins*, 4 M. & W. 399; *Camac v. Warriner*, 1 C. B. 367;

Prideaux v. Bunnett, 1 C. B. n. s. 616; *Shepherd v. Pybus*, 4 Sc. N. R. 444.

machine made on the plaintiff's "patent principle," he had got all he had bargained for, and that there was no implied undertaking that it would, in the defendant's hands and under his management, answer the purpose for which he wanted it. (*t*) Where the defendant undertook to supply the plaintiff, who had entered into an agreement with the East India Company for the conveyance of troops to Bombay, with troop stores guaranteed to pass survey of the East India Company's officers, it was held that this express warranty did not exclude the warranty implied by law, that the stores should be reasonably fit for the purpose for which they were intended. (*u*)

Implied Warranty by Seller that Goods are his own Manufacture. — It has been held (*x*) that there is an implied contract on the part of a manufacturer that the goods delivered shall be those of his own make. At all events, evidence of a custom to that effect is admissible. (*y*)

Implied Warranties on Sales of Provisions. — Every victualler and dealer in provisions, who sells provisions, impliedly warrants them to be wholesome and fit for food. "If I come to a tavern to eat, and the taverner gives and sells me meat and drink corrupted, whereby I am made sick, an action lies against [* 978] him * without any express warranty, because it is a warranty in law." (*z*) If a man contracts to supply victuals to a ship's crew, he impliedly warrants them to be good and wholesome, and fit for the sustenance of man. But where the purchaser examines and selects the article himself, the vendor is not responsible for its being unwholesome, if he sold it without fraud, and in ignorance of its being unfit to eat. (*a*)

Sale by Sample — Implied Warranty.¹ — In all cases of sale

¹ It is the general rule that upon a sale of goods by sample, the quality of the bulk is warranted equal to that of the sample. *Williams v. Spafford*, 8 Pick. 250;

(*t*) *Oliphant v. Bailey*, 5 Q. B. 288; (*z*) *Year Book*, 9 Hen. VI. 53; 13 L. J. Q. B. 34. *Rolle*, Abr. 93 P. pl. 2

(*u*) *Bigge v. Parkinson*, 7 H. & N. 955; 31 L. J. Ex. 301. (*a*) *Burnby v. Bollett*, 16 M. & W. 644; 17 L. J. Ex. 190; *Emmerton v. Matthews*, 31 L. J. Ex. 139; 7 H. & N. 586; but see *Bigge v. Parkinson*, 7 H. & N. 955; 31 L. J. Ex. 301.

(*x*) *Brett and Cotton, L. JJ., Bramwell, L. J., diss.*

(*y*) *Johnson v. Raylton*, 7 Q. B. D. 438.

by sample, there is an implied undertaking or promise on the part of the vendor that the sample is fairly taken from the bulk of the commodity ; but there is no warranty that the bulk is, at the time the sample is exhibited, of the same quality and description as the sample. (b) When there is a written contract of sale, or any note or memorandum of the bargain in writing, the circumstance of the sale being by sample, and of a representation having been made that the bulk corresponded with the sample, cannot be imported into the contract and made use of by the purchaser, if the note or memorandum is silent as to the sample, unless the vendor knew of the defect, and there was consequently a deceitful and fraudulent representation ; for wherever the contract is reduced into writing, the false affirmation or statement must be incorporated into the written contract, to enable any of the contracting parties to avail themselves of it, unless it can be shown to have been false to the knowledge of the party making it, and therefore fraudulent. (c) If goods are sold by a written contract, which contains a description of their quality without referring to any sample, and the goods do not correspond with that description, the vendor cannot exonerate himself from the consequences of the misdescription by showing that they corresponded with a sample exhibited at the time of the sale. (d) But where both parties intended the written con-

Hastings v. Lovering, 2 Pick. 219 ; *Henshaw v. Robins*, 9 Met. (Mass.) 86 ; *Bradford v. Manly*, 13 Mass. 139 ; *Lothrop v. Otis*, 7 Allen, 435 ; *Leonard v. Fowler*, 44 N. Y. 289 ; *Messenger v. Pratt*, 3 Lans. 234 ; *Oneida Manuf. Co. v. Lawrence*, 4 Cow. 440 ; *Andrews v. Kneeland*, 6 Cow. 354 ; *Beebe v. Robert*, 12 Wend. 412 ; *Boorman v. Jenkins*, ib. 566 ; *Moses v. Mead*, 1 Den. 378 ; *Brower v. Lewis*, 19 Barb. 574 ; *Hargous v. Stone*, 5 N. Y. 73 ; *Borrekins v. Bevan*, 3 Rawle, 23, 37 ; *Rose v. Beatie*, 2 Nott & M. 538.

But the sale must be made solely by sample. *Beime v. Dord*, 5 N. Y. 95 ; *Cousinery v. Pearsall*, 40 N. Y. Superior Ct. 11 ; *Day v. Raguet*, 14 Minn. 273. Compare, also, *Salisbury v. Stainer*, 19 Wend. 159 ; *Williams v. Spafford*, 8 Pick. 250 ; *Dickinson v. Gay*, 7 Allen, 29 ; *Bradford v. Manly*, 13 Mass. 139. In Pennsylvania, it has been held upon a sale by sample, that there is simply a guaranty that the goods shall be similar in kind, and merchantable. *Boyd v. Wilson*, 83 Pa. St. 319.

(b) *Ormrod v. Huth*, 14 M. & W. 651 ; *Sayers v. London & Birmingham Flint-Glass and Alkali Company*, 27 L. J. Ex. 294. *Freeman v. Baker*, 5 B. & Ad. 804 ; *Moens v. Heyworth*, 10 M. & W. 147 ; see *post*, p. * 985.

(c) *Meyer v. Everth*, 4 Campb. 23 ; (d) *Tye v. Fynmore*, 3 Campb. 461.

tract to contain a stipulation that the article purchased was to be according to sample, and that stipulation is omitted by mistake, the purchaser may decline to accept the article if it does not agree with the sample. (e) Where goods have been sold by sample, evidence of a custom of trade, as to returning or making an allowance for such of the goods as do not answer the sample, is receivable. (f)

[* 979] * **Warranty as to Genuineness of Articles with Trade-Marks.** — By the 25 & 26 Vict. c. 88, sect. 19, in every case in which any person shall sell or contract to sell (whether by writing or not) to any other person any chattel or article with any trade-mark thereon, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing, together with which such chattel or article shall be sold or contracted to be sold, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that every trade-mark upon such chattel or article, or upon any such cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing as aforesaid, was genuine and true, and not forged or counterfeited, and not wrongfully used, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

Warranty of Description as to Quantity or Country. — By the 25 & 26 Vict. c. 88, sect. 20, in every case in which any person shall sell or contract to sell (whether by writing or not) to any other person any chattel or article upon which, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing together with which such chattel or article shall be sold or contracted to be sold, any description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or of the place or country in which such chattel or article shall have been made, manufactured, or produced, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that no such

(e) *Borrowman v. Rossell*, 16 C. B. n. s. 68; 33 L. J. C. P. 111. (f) *Cooke v. Riddellien*, 1 Car. & Kirw. 561.

description, statement, or other indication was in any material respect false or untrue, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

Representations amounting to a Warranty.— Many representations and descriptions of the subject-matter of a contract are of such a nature and have been made under such circumstances, that the party making them may fairly be considered to warrant or vouch his knowledge of their truth and accuracy, so as to be estopped from afterward setting up his want of knowledge. This is the case when the means of information are peculiarly within his reach, or he pretends to have informed himself upon the subject, and to know all about it, when in truth he knows nothing at all about it. (g) Where the vendor of a ship published a written * description of the vessel, which represented the hull to be nearly as good as when launched, [* 980] whereas it was worm-eaten and unseaworthy, and the keel was broken, and it appeared that the vendor had caused the description to be written and circulated without having examined the bottom of the vessel, and without knowing whether the description was true or false, and the vessel was afloat and the hull covered with water, so that the purchaser had no means of examining the hull himself, it was held that the vendor must be considered to have warranted the fact to be as he asserted. (h) If a jeweller represents a piece of crystal to be a diamond, or a common stone to be a bezoar stone, this would now be considered to amount to a warranty of the fact to a purchaser, and the jeweller would be responsible accordingly, whether he knew the representation to be true or false ; (i) for wherever the means of obtaining correct information lie peculiarly with the party making the assertion, and he asserts a falsehood to be the truth, not knowing whether it is or is not, he is as much responsible as if he had known the falsehood of what he asserted. (k)

(g) *Haycraft v. Creasy*, 2 East, 103, 104 ; *Moens v. Heyworth*, 10 M. & W. 155 ; *Fitzherbert v. Mather*, 1 T. R. 15. (i) *Chandelor v. Lopus*, Cro. Jac. 4, and the note, 1 Smith's Leading Cases, 5th ed. 161.
(h) *Schneider v. Heath*, 3 Campb. 508 ; *Pawson v. Watson*, 2 Cowp. 788 ; *Adamson v. Jarvis*, 4 Bing. 73. (k) *Rawlins v. Wickham*, 3 De G. & J. 304 ; 28 L. J. Ch. 192.

If the vendor of a house and the good-will of a business represents the business done on the premises to be greater than it really is, and so induces the purchaser to give more than the house or the good-will is worth, this amounts to a warranty of the fact stated, although the statement may have been the result of a mistake, because the annual profit of the trade lies peculiarly within the private knowledge of the vendor. (*l*) It must be imputed to him that he knew the fact; and whether he did or did not, is of no matter; "he undertook to know, by undertaking to give the description." (*m*) A purchaser of a house gave £7350 for the house upon the faith of letters from the vendor stating that "the house was in so good a state as not to require any repairs whatever," whereas the house was, at the time the letters were written, affected with the dry rot, and the floors gave way shortly after the purchaser took possession of it; and it was held that the vendor was responsible to the purchaser for such a sum as would put the house into the state he had represented it to be in. (*n*) It is not sufficient to show that an article delivered is equally good with that which was bargained for, although it is of a different description. If the article [* 981] sold is described, the * description amounts to a warranty that it shall be an article of the kind described. (*o*)

Representations not amounting to a Warranty. — But there is no warranty of the party's knowledge, or of the fact being as it is stated to be, if the representation is made concerning some matter, the knowledge of which lies as much within the power of the one party as the other, and the correctness or incorrectness of which may be ascertained by the party interested in knowing the truth by the exercise of ordinary inquiry and diligence, provided the representation is not made for the purpose of throwing the latter off his guard and preventing him from making those inquiries and examinations which every prudent person ought to make. (*p*) Where the false representation is material, however, the party must be taken to have entered into the contract

(*l*) *Risney v. Selby*, 1 Salk. 211;
Mummary v. Paul, 1 C. B. 316; *Taylor*
v. Green, 8 C. & P. 319.

(*m*) *Calverley v. Williams*, 1 Ves.
 Jun. 212.

(*n*) *Grant v. Munt*, Coop. Ch. C. 173.

(*o*) *Bowes v. Shand*, 2 Ap. Cas. 455;
per Lord Blackburn.

(*p*) *Attwood v. Small*, 6 Cl. & Fin.
 338; *Clapham v. Shillito*, 7 Beav. 146.

on the faith of it, and the contract will be rescinded. (q) Where a house was represented as a residence fit for a respectable family, the court said the purchaser might have seen the house and judged for himself, and he could not complain that the house did not answer the description, when ordinary diligence would have enabled him to make sure ; it was merely a puff. (r) So where an estate was described as being within a ring-fence, but did not answer the description, and it appeared that the purchaser had gone over the estate before he entered into the contract, that he had lived in the neighborhood all his life, and must have known, at the time he made the bargain, whether the property did or did not lie within a ring-fence, it was held that there was no warranty and no deceit. (s) When a general warranty is given on a sale, defects which were apparent at the time of the making of the bargain, and were known to the purchaser, cannot be relied on as a ground of action. (t) "If one sells purple to another, and saith to him, 'This is *scarlet*,' the warranty is to no purpose, for that the other may perceive this ; and this gives no cause of action to him. To warrant a thing that may be perceived at sight, is not good." (u)

Representations of Matters of Opinion and Belief. — A representation, moreover, frequently amounts to a mere statement of the party's own opinion and belief upon a matter concerning which the other contracting party is to exercise his own judgment, and does not amount to a positive affirmation or statement of a fact. * Thus if the vendor of a picture [* 982] submitted to the inspection and examination of the purchaser, states it to be the work of a particular artist, it is always a question for the jury to determine whether the statement amounted to a mere expression of the vendor's own opinion and belief upon a matter concerning which the buyer was to exercise his own judgment, or whether it was understood to be

(q) *Redgrave v. Hurd*, 20 Ch. D. 1. It is otherwise where the misrepresentation is trivial. *Smith v. Chadwick*, 20 Ch. D. 27.

(r) *Magennis v. Fallon*, 2 Moll. 561.

(s) *Dyer v. Hargrave*, 10 Ves. 505 ; *Cowen v. Simpson*, 1 Esp. 290.

(t) *Margetson v. Wright*, 5 Moo. & P. 610 ; 7 Bing. 603 ; 1 M. & Sc. 622 ; 8 Bing. 454 ; *Ekins v. Tresham*, 1 Lev. 102.

(u) *Bailey v. Merrell*, 3 Bulstr. 95.

a positive affirmation or warranty of the fact. (x) Where a purchaser inquires for himself, and acts upon his own opinion, he cannot say that he has been misled by the false statement of another; (y) and if he inspects and examines the article for himself, and selects it after exercising his own judgment upon its character and quality, the vendor only warrants that the article is, so far as he knows, what it appeared to be, and what he believed it to be, at the time he sold it. (z) Thus where the plaintiff, having heard that the defendant had some barley to sell, went to the defendant's counting-house, where a person who managed the defendant's business produced a sample of barley which he said was seed barley, and the plaintiff then looked at the barley, and said it was a good sample of seed barley, and bought it; and it turned out that both parties were mistaken, and that the barley was not what was ordinarily known in the market as "seed barley," but what was called "barley bigg;" and it appeared that both parties had equal means of knowledge of the true character of the article, that both had believed it to be seed barley, and that it was bought and sold as such,—it was held that what the defendant's servant said about the article amounted, under the circumstances, merely to an expression of his own opinion and belief about it, and did not amount to a warranty. (a) But where the purchaser has not examined for himself, and has not relied upon his own judgment in the matter, but has acted upon the faith of the representation made to him, then the representation amounts, as we have seen, to a warranty of the fact.

Warranty on Sales of Horses.—The owner of a horse who has used and driven it, or has had the means of doing so, has greater means of knowledge than a stranger, who knows nothing about the animal. If, therefore, the owner offers the horse for sale, every representation that he makes to the buyer respecting the qualities and capabilities of the animal amounts to a war-

(x) *Jendwine v. Slade*, 2 Esp. 572; (y) *Jennings v. Broughton*, 17 Jur. Lomi v. Tucker, 4 C. & P. 15; De Sew- 905.
hanberg v. Buchanan, 5 C. & P. 343; (z) *Ormrod v. Huth*, 14 M. & W. 664.
Power v. Barham, 4 Ad. & E. 473; 6 N. 664.
& M. 62; 7 C. & P. 356; *Dunlop v.* (a) *Carter v. Crick*, 4 H. & N. 416;
Waugh, Peake, 167. 28 L. J. Ex. 238.

ranty, although the word warrant is never used by him. "If parties are dealing for a horse, and the seller says, 'You may depend upon it * that the horse is perfectly free [*983] from vice,' that is a very sufficient warranty, though the word WARRANT was not used." (b) If the purchaser of a horse tells the vendor in a letter, "You represented the horse to me as a five-year-old," and the defendant answers, "The horse is as I represented," this is evidence from which a WARRANTY may be inferred. (c) If a horse offered for sale has a cough and running at the nose, and the vendor says that it is a mere cold, and that he will deliver the horse sound and free from blemish in a week, that amounts to a warranty to a purchaser that the horse has nothing more than a cold upon him. (d) "If a purchaser," observes Best, C. J., "asks for a carriage-horse, or a horse fit to carry a lady or a timid or infirm person, the seller who knows the qualities of the horse he supplies in answer to the demand, undertakes, on every principle of honesty, that it is fit for the purpose specified." (e) We have already seen that a warranty will not bind a man in a thing that is apparent (*ante*, p. * 981), as to warrant that a horse has both his eyes, when he has manifestly lost one of them. (f) If, therefore, at the time of the sale of a horse, the animal is warranted sound in wind and limb, that is understood to mean saving those manifest and visible defects which were obvious to all observers; and if the horse was manifestly blind or obviously lame, and the purchaser examined the animal before he bought it, and must have been aware of these patent defects, the vendor's representation will give no cause of action. But a purchaser who relies upon a warranty is not bound to make any particular examination of a horse before he buys, to ascertain whether a defect exists. If, relying upon a warranty, he omits to make any particular examination of the animal, and consequently fails to discover a defect which might have been ascertained by examination, he is, nevertheless, entitled to maintain an action; (g) and if a manifest defect is not

(b) *Thorogood's case*, 2 Co. Rep. 9 a,
b; *Cave v. Coleman*, 3 M. & R. 4.
(c) *Salmon v. Ward*, 2 C. & P. 211.
(d) *Liddard v. Kain*, 9 Moore, 356.

(e) *Jones v. Bright*, 3 Moo. & P. 175.
(f) *Ekins v. Tresham*, 1 Lev. 102.
(g) *Holyday v. Morgan*, 28 L. J.
Q. B. 9.

necessarily of a permanent nature, — if a horse has a cough and running at the nose, and the vendor says that it is merely a cold, and that the horse will be sound and well in a given time, and the purchaser buys in reliance upon the truth of the representation, — the vendor, as we have seen, will be responsible in damages if the horse continues unsound and permanently diseased. (*h*)

Evidence of the Breach of Warranty of a Horse — What Constitutes Unsoundness. — “The rule as to unsoundness,” observes

Parke, B., “is, that if at the time of the sale the horse [* 984] has * any disease, or has undergone any alteration of structure, either from disease or accident, which actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress, or from its ordinary effects, will diminish the natural usefulness of the animal, such horse is unsound. I think the word ‘sound’ means, that the animal is free from disease at the time he is warranted. If we once let in considerations of the slightness of the disease and facility of cure, where are we to draw the line? A horse may have a cold, which may be cured in a day; or a fever, which may be cured in a week or month; and it would be difficult to say where to stop. Of course, if the disease be slight, the unsoundness is proportionally so, and so also ought to be the damages.” (*i*) Convexity of the cornea, rendering a horse short-sighted, and causing him to shy, is unsoundness. (*k*) It is not enough for the plaintiff to give evidence inducing a suspicion that the horse was unsound at the time of the warranty. If he only throws the soundness into doubt, he is not entitled to recover. (*l*)

Proof of Manifest Defects not covered by the Warranty. — If the defendant can prove that the defect complained of by the plaintiff was a manifest defect obvious to all observers, and that the plaintiff examined the horse, and knew of the defect at the time he bought the animal, the defect will be excluded from the warranty. If the horse was naturally ill-formed, from turning

(*h*) Liddard v. Kain, *supra*.

(*i*) Kiddell v. Burnard, 9 M. & W.

669.

(*k*) Holyday v. Morgan, 28 Law J.

Q. B. 9.

(*l*) Eaves v. Dixon, 2 Taunt. 343.

out one of its fore-legs, so as to be incapable of doing much work without cutting the ankle with the shoe, so as to produce lameness, this is not unsoundness, rendering the vendor liable in damages for a breach of warranty. (*m*) The peculiar form of hock called "curby hock," which is a natural defect, is not an unsoundness, if it has not occasioned lameness up to the time of the sale, although such horses are very liable to throw out a curb, and become lame. (*n*) But bone spavin in the hock is unsoundness, although it may not produce lameness for years. (*o*) A natural malformation of the animal, constituting a patent defect visible to the eye of every observer, must be taken to be known to a purchaser who has examined the horse, and he will be deemed to have bargained for the warranty of soundness subject to the patent defect; but if the defect is not obvious, it must be proved that the purchaser was cognizant of it at the time he * purchased, for the very fact of the warranty [* 985] having been given would tend to throw him off his guard, and prevent him from making a close examination of the animal. (*p*)

Proof of Vice. — If a horse has been warranted free from vice, and the horse is proved to be a crib-biter, the warranty is broken. "The habit of crib-biting," observes Parke, B., "may not indeed show vice in the temper of the animal, but as it is a habit decidedly injurious to its health, and tending to impair its usefulness, it comes within the meaning of the term vice." (*q*)

Proof of Warranties. — It has been held that a warranty made orally, on the completion of a written contract of sale, cannot be introduced as part of the contract, if the contract itself is silent as to the fact of the warranty, as it is a rule of law that oral evidence shall not be given "to superadd any term to a written agreement, for it would be setting aside all written contracts, and rendering them of no effect" (see *ante*, p. * 978). But although a warranty cannot be superadded to a written contract by oral testimony, yet if it can be shown that the contract was

(*m*) Alderson, J., *Dickinson v. Follett*, 1 M. & Rob. 300.

(*n*) *Brown v. Elkington*, 8 M. & W. 132.

(*o*) *Watson v. Denton*, 7 C. & P. 85

(*p*) *Holyday v. Morgan*, 28 Law J. Q. B. 9.

(*q*) *Scholefield v. Robb*, 2 M. & Rob. 210.

induced by an oral warranty made by one of two contracting parties, which was false to the knowledge of the party making it, and was made for the purpose of throwing the other contracting party off his guard, and fraudulently obtaining his consent to the bargain, this is a circumstance altogether collateral to the contract, and the proof of it by oral testimony does not in anywise infringe upon the preceding rule of law. The oral evidence cannot be received to show that the contract itself was different from that authenticated by the written instrument; but it is admissible to show that the assent of the party to the contract was obtained under false pretences, and that the contract is bottomed in fraud, and has therefore no legal existence. *Ex dolo non oritur contractus*. The oral evidence of the false and fraudulent representation in such a case has not the effect of altering, varying, or adding to the written contract, but, admitting the contract in all its terms, it seeks to show that the party guilty of the fraud ought not to have the assistance of a court of justice for the enforcement of it. "If duress be pleaded, or a false reading of the deed, you avoid the deed at law by parol evidence; but then these facts are collateral to the import of the instrument, they do not vary or alter it." The oral evidence is offered, not to affect the terms of the contract itself, but to destroy the remedy by way of action upon it. (r) So, also, it is ground for an action of deceit. (s) An unstamped [*986] written agreement may be given in evidence to prove fraud, if it is used merely for the purpose of showing that a person paying money has been imposed upon. (t) Where representations which may amount to a warranty are contained in letters which constitute a contract of sale, evidence is admissible of the surrounding circumstances for the purpose of showing that no warranty was contemplated by the parties. (u)

Proof that the Plaintiff relied upon the Representation, and not upon his own Examination and Judgment. — "Cases fre-

(r) *Collins v. Blantern*, 2 Wils. 347; *Meyer v. Everth*, 4 Campb. 22; *Canham Wright v. Crooks*, 1 Sc. N. R. 698; *v. Barry*, 15 C. B. 597.

Hutchinson v. Morley, 7 Sc. 341; *Davis* (t) *Holmes v. Sixsmith*, 7 Exch. 807; 21 L. J. Ex. 312.

Symonds, 1 Cox, Eq. Cas. 405. (u) *Stucley v. Baily*, 1 H. & C. 405; 31 L. J. Ex. 483.

quently occur in which, upon entering into contracts, misrepresentations made by one party are not in any degree relied upon by the other party. If the party to whom the representations were made, himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to render it incumbent upon a court of justice to impute to him a knowledge of the result which, upon due inquiry, he ought to have obtained, and thus the notion of reliance upon the representations made to him may be excluded. Again, when we are endeavoring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made by him who was supposed to be better informed; but if the subject is in its nature uncertain, if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much influence upon the other." (x)

Cases frequently occur in which it appears that a contract was * entered into after erroneous representations made by one party, and yet without the other party having at all relied upon those erroneous representations. (y)

Construction of Express Warranties.—Where there was an

(x) *The Master of the Rolls*, Clapham v. Shillito, 7 Beav. 149. R. 594; Holt, C. J., *Lysney v. Selby*, 2 Ld. Raym. 1120.

(y) *Shrewsbury v. Blount*, 2 Sc. N.

agreement for the sale and purchase of all the naphtha the defendant might make during two years, "say from one thousand to twelve hundred gallons a month," it was held that these words did not amount to an undertaking or warranty that that quantity of naphtha should be manufactured and sold per month. (z) But where the agreement was to prepare and sell "say not less than one hundred" &c., it was held that the words did amount to a warranty or undertaking that at least the quantity specified should be prepared and sold. (a) Warranties of quantity and quality made on sales of goods and chattels will be regulated by the apparent intention of the parties at the time the contract was entered into. There is no necessity that the word "warrant" or "promise" should occur in the bargain; but the promise or representation must form part of the contract of sale. (b) Where a sale note made on the purchase of a horse described the animal as "a black gelding, about five years old, constantly driven in the plough — warranted," it was held that, if the word "warranted" had been placed at the commencement of the sentence, it would have extended to the sex and age of the horse, and his fitness for the plough; but as it concluded the sentence, it extended only to the soundness of the animal, the preceding sentences being merely descriptive of the horse, and of the work to which it had been accustomed. (c) And where the seller gave the purchaser a written receipt for the purchase-money, describing the horse as a bay gelding got by Cheshire Cheese, warranted sound, it was held that the warranty was confined to the soundness of the animal, and did not extend to the description of his parentage. So where a written receipt described the horse sold as "a gray four years' old colt, warranted sound in every respect," it was held that the warranty did not extend to the description of the age of the animal, and that if the parties had meant to warrant the age as well as the soundness of the colt, the words should have been "warranted a four years' old colt,

(z) *Gwillim v. Daniell*, 2 C. M. & R. "net proceeds;" *Caine v. Horsfall*, 1 Exch. 523.

(a) *Leeming v. Snaith*, 16 Q. B. 275. (b) *Hopkins v. Tangueray*, 15 C. B. 138.

As to the effect of the words "about" or "more or less," see *ante*, p. * 944; (c) *Richardson v. Brown*, 8 Moore, *Bourne v. Seymour*, 25 L. T. R. 162, 338.

and sound in every respect." (d) Where, on the sale of a horse, the seller signed the following warranty: "Mr. C. bought * of Mr. G. G. a bay horse for ninety pounds, warranted [* 988] sound. £90. Warranted sound for one month,"—it was held that the latter words limited the duration of the warranty, and meant that it was to continue in force for one month only, and that complaint of unsoundness must, therefore, be made by the purchaser within one month of the sale. (e) But the construction to be put upon contracts and representations of this description will be regulated by the surrounding circumstances of each particular case, which must be regarded, in order that the true meaning and intention of the parties may be discovered.

Warranties by Agents.—The general presumption is that, where a principal intrusts property to an agent to sell, he authorizes him to make all such warranties as are usual in the ordinary course of that particular business of selling, and that, if it is usual to sell with a warranty, he has an implied authority to warrant. (f) The agent or servant of a horse-dealer has an implied authority to bind his principal or master by a warranty, even although (unknown to the buyer) he has express orders not to warrant; and evidence of an alleged custom among horse-dealers not to give a warranty where the purchaser obtains a veterinary surgeon's certificate of soundness, is not admissible to contradict such implied authority. (g) But a servant intrusted on one particular occasion to sell, has no implied authority to warrant so as to bind the owner. (h)

Effect of a Breach of Warranty by the Vendor.—If it appears to have been the intention of the parties that a sale of chattels should be an absolute sale with a warranty superadded, the purchaser cannot annul the sale and return the thing sold, unless there has been actual fraud, and the vendor knew at the time of the sale that the thing sold did not answer the warranty; but

(d) *Budd v. Fairman*, 1 M. & Sc. 78. As to unsoundness, see *Kiddell v. Burnard*, 9 M. & W. 670. (g) *Howard v. Sheward*, L. R. 2 C. P. 148; 36 L. J. C. P. 42. (e) *Chapman v. Gwyther*, L. R. 1 Q. B. 463; 35 L. J. Q. B. 142. (h) *Brady v. Tod*, 9 C. B. n. s. 592; 30 L. J. C. P. 223. But as to this, see *ante*, p. * 52. (f) *Dingle v. Hare*, 7 C. B. n. s. 145; 29 L. J. C. P. 148.

if the sale is conditional on the thing sold being in accordance with the warranty, the purchaser will be entitled to annul the sale, and return the article and recover the price, if the condition is not fulfilled. Where the plaintiff exchanged a watch with the defendant for a pair of candlesticks warranted to be silver, which turned out to be base metal, it was held that the defendant could not rescind the contract and return the candlesticks, and claim back his watch, without proving that the plaintiff knew that the candlesticks were not silver at the time he gave

the warranty. (i) Lord Eldon is reported to have said [* 989] that if a * person purchases a horse which is warranted sound, and it afterward turns out that the horse was unsound at the time of the warranty, the buyer might return the horse and bring an action to recover the full money paid, but that the seller had a right to expect that the horse should be returned in the same state he was in when sold, and not by any means diminished in value. (k) "It is, however, impossible," justly observes Lord Tenterden, "to reconcile this doctrine with those cases in which it has been held that, where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and revest the property in the vendor and recover the price as on a consideration which has failed, but must sue upon the warranty, unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether." "If these cases," observes his lordship, "are rightly decided, — and we think they are, and they certainly have always been acted upon, — it is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, revest the property in the seller and recover the price, when paid, on the ground of the total failure of consideration." (l) Where goods are sold "guaranteed equal to sample," if the sale

(i) *Emanuel v. Dane*, 3 Campb. 300. 184; *Toulmin v. Hadley*, 2 C. & K.

(k) *Curtis v. Hannay*, 3 Esp. 83. 157; *Foster v. Smith*, 18 C. B. 160;

(l) *Street v. Blay*, 2 B. & Ad. 462; *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447; 36 L. J. Q. B. 790; *Gattorno v. Dawson v. Collis*, 10 C. B. 153; *Parsons v. Sexton*, 4 C. B. 907; 16 L. J. C. P. Adams, 12 C. B. n. s. 566.

is not of specific goods, such a clause is a condition going to the essence of the contract, and the buyer may reject them if they are not equal to sample; but where the sale is of specific goods, such a clause is, generally speaking, collateral to the covenant, and if the goods are not equal to sample, only entitles the buyer to a reduction of the price, or to an action for damages. (*m*) If, however, the thing delivered does not answer the description of that which was sold, — if, that is, it differs in kind and not in quality only, so as to amount in effect to a different article, the buyer is not bound to take it, and if he has paid for it, he may recover back the money. (*n*)

Conditional and Defeasible Sales.¹ — If, on the sale of a horse, it is part of the bargain that the animal shall be taken back if it

¹ Where personal property is sold and delivered, or leased with the privilege of purchase, upon the express condition that the title shall not pass to the vendee until payment in full of the price, the great majority of American authorities uphold the vendor's title even against the vendee's creditors, or against subsequent purchasers in good faith and without notice.

I. Such is the law in the following States, — Maine: *Tibbetts v. Towle*, 12 Me. 341; *Brown v. Haynes*, 52 Me. 578; *George v. Stubbs*, 26 Me. 243; *Sawyer v. Fisher*, 32 Me. 28; *Crocker v. Gullifer*, 44 Me. 491; *Hotchkiss v. Hunt*, 49 Me. 213; *Everett v. Hall*, 67 Me. 497. As to such a condition incorporated into a note, see Me. Rev. Stat. (1871), c. 111, sect. 5, p. 787; *Boynton v. Libby*, 62 Me. 253; *Rawson v. Tuel*, 47 Me. 506; *Drew v. Smith*, 59 Me. 393.

New Hampshire: *Sargent v. Gile*, 8 N. H. 325; *Porter v. Pettengill*, 12 N. H. 299; *Bailey v. Colby*, 34 N. H. 29; *King v. Bates*, 57 N. H. 446; *Holt v. Holt*, 58 N. H. 276; *Kimball v. Jackman*, 42 N. H. 242; *McFarland v. Farmer*, 42 N. H. 386.

Vermont: *Armington v. Houston*, 38 Vt. 448; *Duncan v. Stone*, 45 Vt. 118; *Bumell v. Marvin*, 44 Vt. 277; *Buckmaster v. Smith*, 22 Vt. 203; *Child v. Allen*, 33 Vt. 476. Record is required by statutes of 1870 and 1872. Rev. L. (1880), sect. 1992, p. 409; *Clark v. Hayward*, 51 Vt. 14; *Phelps v. Bemis*, ib. 487; *Fairbanks v. Davis*, 50 Vt. 251; *Bugbee v. Stevens*, 53 Vt. 389. But actual notice has the same effect. *Kelsey v. Kendall*, 48 Vt. 24. An attaching creditor can extinguish the vendor's right by making payment or tender. Rev. L. (1880), sect. 1186, p. 273; *Duncan v. Stone*, 45 Vt. 118.

Massachusetts: *Coggill v. Hartford, &c. R. R. Co.*, 3 Gray, 545; *Gilbert v. Thompson*, ib. 550, n.; *Blanchard v. Child*, 7 Gray, 155; *Burbank v. Crooker*, ib. 158; *Deshon v. Bigelow*, 8 Gray, 159; *Hirschorn v. Canney*, 98 Mass. 149; *Booraem v. Crane*, 103 Mass. 522; *Canter v. Kingman*, ib. 517; *Barrett v. Pritchard*, 2 Pick. 512; *Hussey v. Thornton*, 4 Mass. 405; *Pettis v. Kellogg*, 7 Cush. 456; *Armour v. Pecker*, 123 Mass. 143. As to the rights and duties of the conditional vendee, see, further, Pub. Stat. (1882), p. 1103, c. 192, sect. 13; ib. p. 1148, c. 203.

(*m*) *Heyworth v. Hutchinson*, L. R. 2 Q. B. 451; 36 L. J. Q. B. 270. (*n*) *Azemar v. Casella*, L. R. 2 C. P. 431; ib. 677; 36 L. J. C. P. 124, 263.

is unsound, or does not answer the warranty, the purchaser will be entitled to return the animal, and recover back the

sect. 74; *Currier v. Knapp*, 117 Mass. 324; *Day v. Bassett*, 102 Mass. 445; *Harrington v. King*, 121 Mass. 269; *Chase v. Ingalls*, 122 Mass. 381; *Compton v. Pratt*, 105 Mass. 255; *Newhall v. Kingsbury*, 13 Reporter, 49.

Rhode Island: *Goodale v. Fairbrother*, 12 R. I. 233.

Connecticut: *Forbes v. Marsh*, 15 Conn. 384; *Hart v. Carpenter*, 24 Conn. 427; *Brown v. Fitch*, 43 Conn. 512; *Hine v. Roberts*, 48 Conn. 267; *Lewis v. McCabe*, 21 Am. L. Reg. n. s. 217, and note by L. S. Landreth, ib. 224. By statute, an attaching creditor of the vendee succeeds to all his rights. Gen. Stat. (1875), p. 408, sect. 35.

New York: *Ballard v. Burgett*, 40 N. Y. 314; *Austin v. Dye*, 46 N. Y. 500; *Cole v. Mann*, 62 N. Y. 1; *Moore v. Metropolitan Bank*, 55 N. Y. 41; *Boon v. Moss*, 70 N. Y. 465; *Herring v. Hoppock*, 15 N. Y. 409; *Strong v. Taylor*, 2 Hill, 326; *Maynard v. Anderson*, 54 N. Y. 641; *McGoldrick v. Willets*, 52 N. Y. 612; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Farmers', &c. Nat. Bank*, 74 N. Y. 568; *Comer v. Cunningham*, 77 N. Y. 391; *Coman v. Lakey*, 80 N. Y. 345; *Bean v. Edge*, 84 N. Y. 510.

New Jersey: *Cole v. Berry*, 42 N. J. L. 308.

Pennsylvania: A distinction, however, is made between cases where there is a present contract of sale, accompanied by delivery, with an agreement that the ownership shall remain in the vendor until the purchase-money is paid, and cases where, by the terms of the contract, the vendee receives a chattel to keep for a certain time, and then to become owner of it, if he has paid the stipulated price, otherwise to pay for its use. Transfers of the former class are held to be fraudulent and void as to creditors of the vendee and innocent purchasers, while those of the latter kind are construed as bailments for hire, and the property does not change until the price is paid. This rule is confessedly difficult of application, yet the Supreme Court steadfastly adheres to it. *Stadfeld v. Huntsman*, 92 Pa. St. 53; *Brunswick, &c. Co. v. Hoover*, 95 Pa. St. 508. Under the first head fall: *Martin v. Mathiot*, 14 Serg. & R. 214; *Jenkins v. Eichelberger*, 4 Watts, 121; *Thompson v. Paret*, 94 Pa. St. 275; *Haak v. Linderman*, 64 Pa. St. 499; *Waldon v. Haupt*, 52 Pa. St. 408; *Welsh v. Bell*, 32 Pa. St. 12; *Mitchell v. Commonwealth*, 37 Pa. St. 187; *Cummings v. Thomas*, 13 Reporter, 605; *Heppe v. Speakman*, 3 Brews. 548; *Rose v. Story*, 1 Barr. 190. Under the second head fall, *Clark v. Jack*, 7 Watts, 375; *Myers v. Harvey*, 2 Penr. & W. 478; *Lehigh Co. v. Field*, 8 Watts & S. 232; *Rowe v. Sharp*, 51 Pa. St. 26; *Chamberlain v. Smith*, 44 Pa. St. 431; *Henry v. Patterson*, 57 Pa. St. 346; *Beeker v. Smith*, 59 Pa. St. 469; *Crist v. Kleber*, 79 Pa. St. 290; *Enlow v. Klein*, ib. 488. As to chattels real, see *Christie's Appeal*, 85 Pa. St. 403.

Ohio: *Sanders v. Keber*, 28 Ohio St. 630; *Sage v. Steutz*, 23 Ohio St. 1; *Roland v. Grundy*, 5 Ohio, 202.

Indiana: *Domestic Sewing-Machine Co. v. Arthursultz*, 63 Ind. 322; *Bradshaw v. Warner*, 54 Ind. 58; *Sims v. Wilson*, 47 Ind. 226; *Dunbar v. Rawles*, 28 Ind. 225; *Hodson v. Warner*, 60 Ind. 214; *Hanway v. Wallace*, 18 Ind. 377; *Plummer v. Shirley*, 16 Ind. 380; *Shireman v. Jackson*, 14 Ind. 459; *Thomas v. Winters*, 12 Ind. 322; *Chissom v. Hawkins*, 11 Ind. 316; *Litterel v. St. John*, 4 Blackf. 326.

Michigan: *Fisfield v. Elmer*, 25 Mich. 48; *Whitney v. McConnell*, 29 Mich. 12; *Couse v. Tregent*, 11 Mich. 65. See also *Preston v. Whitney*, 23 Mich. 260.

Wisconsin: *Hunter v. Warner*, 1 Wis. 141. Record is required by statute of

purchase-money, * on proof of the unsoundness of the [* 990] horse. Where an agent intrusted to sell a mare, but

1873: *Rev. Stat.* (1878), 656, sect. 2317; *Williams v. Porter*, 41 *Wis.* 422. Compare *Pitts v. Owen*, 9 *Wis.* 152; *Chamberlain v. Dickey*, 31 *Wis.* 68; *Bunn v. Valley Lumber Co.*, 51 *Wis.* 376.

Iowa: *Moseley v. Shattuck*, 43 *Iowa*, 540, and cases cited; *Thorpe v. Fowler*, 13 *Reporter*, 237. Record is required by statute of 1872; *Code*, sect. 1922.

Missouri: *Sumner v. Cottey*, 71 *Mo.* 121; *Wangler v. Franklin*, 70 *Mo.* 659; *Griffin v. Pugh*, 44 *Mo.* 326; *Little v. Page*, *ib.* 412; *Parmlee v. Catherwood*, 36 *Mo.* 479; *Ridgeway v. Kennedy*, 52 *Mo.* 24. Record is required by statute of 1877. *Rev. Stat.* (1879), 419, 420, sects. 2505, 2507, 2508.

Kansas: *Sumner v. McFarlan*, 15 *Kan.* 600; *Hallowell v. Milne*, 16 *Kan.* 65; *Hall v. Draper*, 20 *Kan.* 137; *Lynds v. Winkler*, 23 *Kan.* 697.

Nebraska: *Aultman v. Mallory*, 5 *Neb.* 178. Record is required by statute of 1877. *Comp. Stat.* (1881), 290, sects. 26, 27; *Blunk v. Kelley*, 9 *Neb.* 441.

Nevada: *Cardinal v. Edwards*, 5 *Nev.* 36.

California: *Kohler v. Hayes*, 41 *Cal.* 455; *Robinson v. Haas*, 40 *Cal.* 474; *Putnam v. Lamphier*, 36 *Cal.* 151; *Civil Code*, sects. 1141, 1485, &c.

Oregon: *Singer Mannf. Co. v. Graham*, 8 *Oreg.* 17; *Rosendorf v. Hirschberg*, *ib.* 240.

Tennessee: *Hawthorne v. Bowman*, 3 *Sneed*, 524; *Carnes v. Apperson*, 2 *Sneed*, 562; *Buson v. Dougherty*, 11 *Humph.* 50; *Houston v. Dyché*, 1 *Meigs*, 76; *Gambling v. Read*, *ib.* 281; *Burke v. Harrison*, 3 *Sneed*, 237; *Price v. Jones*, 3 *Head*, 84; *Woods v. Burrough*, 2 *Head*, 202; *Bradshaw v. Thomas*, 7 *Yerg.* 497. But see also *Planters' Bank v. Vandyck*, 4 *Heisk.* 617.

Mississippi: *Ketcham v. Brennan*, 53 *Miss.* 596. See also *Duke v. Shackelford*, 56 *Miss.* 552.

Georgia: *Sims v. James*, 62 *Ga.* 260; *Flanders v. Maynard*, 58 *Ga.* 56; *Goodwin v. May*, 23 *Ga.* 205. See also *Bentley v. Johnson*, 63 *Ga.* 661.

North Carolina: *Clayton v. Hester*, 80 *N. C.* 275; *Ellison v. Jones*, 4 *Ired. L.* 48; *Parris v. Roberts*, 12 *Ired. L.* 268; *Ballew v. Sudderth*, 10 *Ired. L.* 176. Compare *Deal v. Palmer*, 72 *N. C.* 582; *Gaither v. Teague*, 7 *Ired. L.* 460; *Vassar v. Buxton*, 14 *Reporter*, 121.

South Carolina: *Talmadge v. Oliver*, 14 *S. C.* 522; *Bennett v. Sims*, 1 *Rice*, 421; *Dupree v. Harrington*, 1 *Harp. L.* 391; *Reeves v. Harris*, 1 *Bailey*, 563; *Bailey v. Jennings*, *ib.* 563; *Cochran v. Roundtree*, 3 *Strobh.* 217. But by statute a merely verbal reservation of title is void as to creditors and subsequent purchasers. *Rev. Stat.* (1873), 480, sect. 6.

In Virginia, Minnesota, and Texas, the law upon this point seems not to have been definitely settled, though the decisions tend toward the same doctrine as that of the States above mentioned. *Old Dominion Steamship Co. v. Burckhardt*, 31 *Gratt.* 664; *Davis v. Turner*, 4 *Gratt.* 422, 441; *McClelland v. Nichols*, 24 *Minn.* 176; *Stillman v. Hurd*, 10 *Tex.* 109; *Case v. Jennings*, 17 *Tex.* 661; *Neade v. Sears*, 31 *Tex.* 105; *Reed v. Lucas*, 42 *Tex.* 529; *Sacra v. Semple*, 12 *Reporter*, 507. In West Virginia, record is required by statute: *Rev. Stat.* (1879), c. 96, sect. 3.

Upon waiver of the condition, or estoppel against the vendor, consult *Hegler v. Eddy*, 53 *Cal.* 597; *Farlow v. Ellis*, 15 *Gray*, 229; *Whitney v. Eaton*, *ib.* 225; *Goodwin v. Boston, &c. R. R. Co.*, 111 *Mass.* 487; *Scudder v. Bradbury*, 106 *Mass.* 422; *Sargent v. Metcalf*, 5 *Gray*, 306; *Kenney v. Ingalls*, 126 *Mass.* 488; *Salomon v. Hathaway*, *ib.* 482; *Robbins v. Phillips*, 68 *Mo.* 100; *Goodale v. Fair-*

not being authorized to warrant her, refused to do so, but at the time of the sale told the purchaser that if the mare was not

brother, 12 R. I. 233; *Mason v. Bickle*, 2 Ont. App. 291; *Walker v. Hymen*, 1 Ont. App. 345. The character of the delivery is affected by the usage of trade. *Tyler v. Freeman*, 3 Cush. 261; *Hill v. Freeman*, ib. 257; *Armour v. Pecker*, 123 Mass. 143; *Ullman v. Barnard*, 7 Gray, 554; *Dresser Manuf. Co. v. Waterson*, 3 Met. (Mass.) 9; *Marston v. Baldwin*, 17 Mass. 606; *Carleton v. Sumner*, 4 Pick. 516; *Smith v. Dennie*, 6 Pick. 262. The property need not be in existence at the time of the conditional sale. *Benner v. Puffer*, 114 Mass. 376. After condition broken, the vendor can convey to a new purchaser without first taking possession of the property. *Hubbard v. Bliss*, 12 Allen, 590. If the conditional vendee be a retail trader, one to whom he sells his whole stock will take no title, nor will his assignee in bankruptcy or insolvency; yet the original vendor might be estopped to deny the title of those who purchased portions of the property at retail in the ordinary course of the vendee's business. *Rogers v. Whitehouse*, 71 Me. 222; *Burbank v. Crocker*, 7 Gray, 158.

II. In the following States, the rights of the vendee's creditors, and of subsequent purchasers without notice, are held superior to those of the vendor,—

Alabama: *Sumner v. Woods*, 52 Ala. 94; *Dudley v. Abner*, ib. 572; *McCall v. Powell*, 64 Ala. 254.

Delaware: *Mears v. Waples*, 4 Houst. 62.

Illinois: *Van Duzor v. Allen*, 90 Ill. 499; *Lucas v. Campbell*, 88 Ill. 447; *Murch v. Wright*, 46 Ill. 487; *Michigan Central R. R. Co. v. Phillips*, 60 Ill. 190; *McCormick v. Hadden*, 37 Ill. 370.

Kentucky: *Vaughn v. Hopson*, 10 Bush, 337; *Geer v. Church*, 13 Bush, 430. Compare *Hart v. Barney, & Co. Manuf. Co.*, 7 Fed. Reporter, 553.

Maryland: *Hall v. Hinks*, 21 Md. 406.

III. Undisputed possession of chattels for a series of years is frequently made by statute to vest an absolute title in the possessor, unless the alleged condition or reservation is evidenced by a writing duly recorded.

In Virginia	for 5 years:	Code (1873), c. 114, sect. 3.
" Illinois	" 5 "	Rev. Stat. (1880), c. 59, sect. 7.
" Missouri	" 5 "	Rev. Stat. (1879), c. 34, sect. 2500.
" Kentucky	" 5 "	Gen. Stat. (1881), c. 489, sect. 4.
" Arkansas	" 5 "	Rev. Stat. (1874), 562, sect. 2957.
" Mississippi	" 3 "	Code (1880), 372, sect. 1293.
" Alabama	" 3 "	Code (1876), 570, sect. 2173.
" Florida	" 2 "	Dig. L. (1881), c. 30, sect. 4.
" Texas	" 2 "	Rev. Stat. (1879), 363, art. 2468.

For the origin of these laws as connected with the existence of slavery, consult *Blackwell v. Walker*, 5 Fed. Reporter, 422.

IV. The Supreme Court of the United States regards a transaction of this kind as a mortgage rather than as a bailment or conditional sale. *Heryford v. Davis*, 102 U. S. 235. Yet compare *Fosdick v. Car Co.*, 99 U. S. 256; *Fosdick v. Schall*, ib. 235; *Huidekoper v. Locomotive Works*, ib. 258; *United States v. New Orleans R. R.*, 12 Wall. 362; *Myer v. Car Co.*, 102 U. S. 1. Various decisions of the U. S. Circuit and District Courts uphold the doctrine, which prevails in most of the States. *Re Binford*, 3 Hughes, 295; *Copland v. Bosquet*, 4 Wash. 588; *D'Wolf v. Babbett*, 4 Mas. 289; *Bauendahl v. Horr*, 7 Blatchf. 548; *Gaylor v. Dyer*, 5 Cranch, C. Ct. 461; *Truman v. Hardin*, 5 Sawyer, 115. But the law of the State where the property is situated, will generally be followed by the Federal courts.

all right, she was not his, and the purchaser then paid the price and took away the mare, and, the animal proving to be unsound, he returned her, and sued for the price, it was held that there was evidence for a jury of the sale being accompanied with a condition authorizing a return of the mare, and enabling the purchaser to recover the price on proof of her unsoundness; (o) so where, pending a negotiation for a sale of hops, the growth of three hundred acres, the purchaser declared that he would not have the hops if the bine had been sulphured, and required and received a written undertaking from the vendor that no sulphur had been used, and the hops were then delivered to, and received by, the purchaser, and it was then ascertained that sulphur had been used on five acres by way of experiment without the knowledge of the vendor, and that these sulphured hops were so mixed with the unsulphured as to be undistinguishable, it was held that the purchaser had a right to avail himself of the breach of the condition and annul the bargain. (p) If a horse is sold on the terms that the buyer is to have the horse a certain time on

Hervey v. Rhode Island Locomotive Works, 93 U. S. 664; *Green v. Van Buskirk*, 5 Wall. 307; s. c. 7 Wall, 139; *Fosdick v. Schall*, 99 U. S. 235; *Nichols v. Levy*, 5 Wall. 433; *State R. R. Tax Cases*, 92 U. S. 575, 618. Cases have been decided by these courts involving the statutes of the following States upon this subject, —

Arkansas: *Blackwell v. Walker*, 5 Fed. Reporter, 419.

Illinois: *Fosdick v. Schall*, 99 U. S. 235; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664.

Iowa: *Myer v. Car Co.*, 102 U. S. 1; *Pittsburg L. & C. Works v. State Nat. Bank*, 2 Cent. L. J. 692.

Kentucky: *Hart v. Barney, &c. Manuf. Co.*, 7 Fed. Reporter, 543.

Missouri: *Heryford v. Davis*, 102 U. S. 235; *Rogers Locomotive Works v. Lewis*, 4 Dill. 158.

V. In the Canadian courts of the Province of Ontario, the same doctrine obtains as in the majority of the States. *Mason v. Bickle*, 2 Ont. App. 291; *Walker v. Hymen*, 1 Ont. App. 345; *Stevenson v. Rice*, 24 U. C. C. P. 245; *Tufts v. Mottashed*, 29 U. C. C. P. 539.

See, further, on conditional sales; and whether a given transaction is a sale, a bailment, chattel mortgage, lease, or the like, articles on Conditional sales, 24 Alb. L. J. 264, and 8 South. L. Rev. n. s. 228; *Lewis v. McCabe*, 21 Am. L. Reg. n. s. 217, and note by L. S. Landreth, ib. 224; *Smith v. Clark*, 21 Wend. 83, 34 Am. Dec. 213, and note by A. C. Freeman, ib. 215; *Mobile Building, &c. Loan Assoc. v. Robertson*, 65 Ala. 382; *Heine v. Roberts*, 48 Conn. 267; *Gammon v. Abrams*, 53 Wis. 323; also *ante*, p. *936.

(o) *Foster v. Smith*, 18 C. B. 156.

(p) *Bannerman v. White*, 10 C. B. n. s. 844; 31 L. J. C. P. 28.

trial, the sale is conditional on the purchaser's approval of the horse after trial, so that if he tries the horse and then returns it, there is no sale. In these cases, the right of property in the specific thing sold passes subject to a condition. If the condition is fulfilled or waived, the sale becomes an absolute sale; if it is not fulfilled or waived, the party in whose favor and for whose protection the condition was imposed is entitled to repudiate the contract and return the subject-matter of the sale and recover the price. (*q*) Where a mare was sold on the terms that if she proved in foal she was to be returned, and the mare proved in foal, it was held that the vendor had a right to have the animal returned to him. (*r*) Where the sale is defeasible within a certain time, the fact that the thing sold has within that time, and without any negligence on the part of the purchaser, ceased to exist, does not disable the purchaser from avoiding the contract. Where a horse was sold with a condition that he might be returned within a specified time if he did not answer the description given of him, and within the time the horse injured itself without any negligence on the part of the purchaser, it was held that the latter was entitled to rescind the [* 991] contract and recover the price of the horse, * which did not answer the description; (*s*) and the same has been held where the horse died. (*t*)

Sale or Return.¹ — When goods are sold under a contract of

¹ *Buffum v. Merry*, 3 Mas. 478; *Thompson v. Russey*, 50 Ala. 329; *McKinney v. Bradlee*, 117 Mass. 321; *Martin v. Adams*, 104 Mass. 262; *Hunt v. Wyman*, ib. 198; *Witherby v. Sleeper*, 101 Mass. 138; *Dearborn v. Turner*, 16 Me. 17; *Buswell v. Bicknell*, 17 Me. 344; *Perkins v. Douglass*, 20 Me. 317; *Walker v. Blake*, 37 Me. 373; *Crocker v. Gullifer*, 44 Me. 491; *Schlesinger v. Stratton*, 9 R. I. 578; *Ray v. Thompson*, 12 Cush. 281; *Jameson v. Gregory*, 4 Met. (Ky.) 363; *Sargent v. Gile*, 8 N. H. 325; *Porter v. Pettengill*, 12 N. H. 300; *Hurd v. West*, 7 Cow. 752; *Washington v. Johnson*, 7 Humph. 468; *Johnson v. McLane*, 7 Blackf. 501; *Moore v. Piercy*, 1 Jones, L. 131; *Wolf v. Dietzsch*, 75 Ill. 205; *Haase v. Nonnemacher*, 21 Minn. 486; *Cohen v. Platt*, 23 Hun, 483; *Wooster v. Sage*, 6 Hun, 285; *Waters' Patent Heater Co. v. Tompkins*, 14 Hun, 219; *Harvie v. Clarkson*, 6 U. C. Q. B. 27; *Sykes v. Parks*, 1 Baxt. 460; *Elphick v. Barnes*, 20 Am. L. Reg. n. s. 240, and note by E. H. Bennett, ib. 244.

(*q*) *Behn v. Burness*, 3 B. & S. 756; (*s*) *Head v. Tattersall*, L. R. 7 Ex. 32 L. J. Q. B. 204. 7; 1 L. J. Ex. 4.

(*r*) *Williams v. Burgess*, 10 Ad. & E. 502. (*t*) *Elphick v. Barnes*, 5 C. P. D. 321.

"sale or return," the sale is a conditional or defeasible sale. The right of property in the goods passes to the purchaser, subject to be divested out of him and revested in the vendor by a return of the goods to the latter, in accordance with the terms of the contract. If the goods are returned or tendered back to the vendor within a reasonable time, the sale is annulled, and the latter cannot recover the price of them; but if the purchaser, having got possession of the goods, fails to exercise his option of returning them within a reasonable time, the contract is discharged of the condition, the sale stands as an absolute sale, and the price of the goods may be recovered in an action for goods sold and delivered. (*u*) So if goods are sold and delivered on the terms that the purchaser is to have three or six months credit, provided he gives the vendor the security of a bill or note at three or six months, and the purchaser refuses to give the bill or note, the sale stands as an absolute sale, and the price is immediately recoverable. (*x*)

Redhibitory Defects enabling a Purchaser to annul a Contract of Sale and recover the Price. — It is a maxim of the civil law that "he who has sold one thing for another, an old thing for a new, or a less quantity than what he undertook to sell, is bound to take back the thing or abate the price, and make good the damages sustained by the purchaser." (*y*) All defects which deprived the purchaser of the use and enjoyment of the subject-matter of the sale altogether, or which rendered it unfit for the purpose for which it was known to be required, were by the Roman lawyers called redhibitory defects, because they gave rise to the redhibitory action, which was brought to compel the vendor to take back the thing sold, and refund the price. (*z*) When the defects in the thing sold gave rise to a redhibition and dissolution of the sale, the vendor and purchaser were restored to the condition they were in before the sale. The vendor was bound

(*u*) *Moss v. Sweet*, 16 Q. B. 493; 20 L. J. Q. B. 167, overruling *Iley v. Frankenstein*, as reported 8 Sc. N. R. 841. Unless perhaps his failure to return the goods is in consequence of the fraud of a third party. See *Ray v. Barker*, 4 Ex. D. 279, C. A.

(*x*) *Rugg v. Weir*, *ante*, p. *1188.

(*y*) Domat, lib. 1, tit. 2, sects. 11, 15; Dig. lib. 18, tit. 1, lex 45; lib. 19, tit. 1, lex 21, sect. 2.

(*z*) Dig. lib. 21, tit. 1, 21, 27. As to redhibitory defects in the French law, see Troplong, c. 4, *De la Vente*.

to restore the price paid, with interest, and the purchaser was bound to restore to the vendor the subject-matter of the [* 992] sale, with all * the profits and advantages he had reaped from it whilst it was in his possession. (a)

Sales rendered Voidable on the Ground of Fraudulent Misrepresentation.¹—It is not every wilful false statement, made with full knowledge of its falsehood, that will amount in judgment of law to a fraud, so as to enable a purchaser to avoid a contract of sale. The ordinary praise or commendation, for example, bestowed by a vendor on the wares he sells, though embodying statements of fact known by the party making them to be not strictly true, does not vitiate the contract of sale.

A misrepresentation, moreover, to enable a purchaser to avoid a sale on the ground of deceit and fraud, must be made concerning some matter very material to the value of the contract, so that there may be fair ground for thinking that the contract would never have been entered into if the false statement had not been made. *De minimis non curat lex*; and, therefore, if a man represents his house to be in good repair, and a few tiles are off the roof, or two or three of the joists under the floor near the ground are rotted with the damp, or a pane of glass is broken in a garret window, such trifling defects, to use the language of Lord Kenyon, "are mere bagatelles," and afford no evidence of *mala fides*. (b) To all trifling and unimportant representations not seriously affecting the value of the contract, and to all affirmations of matters of opinion and judgment not amounting to positive assertions of fact with knowledge of their falsehood, the maxim of *caveat emptor* must apply; (c) for whilst we ought not, on the one hand, to suffer plain dealing, simplicity, and good faith to become a prey to double dealing and treachery, so, on the other hand, we ought not readily to annul contracts because everything has not been conducted within the bounds of a per-

¹ See *post*, p. * 1173.

(a) "Facta redhibitione, omnia in integrum restituuntur, perinde ac si neque emptio neque venditio intercessit." (b) *Geddes v. Pennington*, 5 Dow. 163, 164. (c) *Lowndes v. Lane*, 2 Cox. 363; — *Dig. lib. 21, tit. 1, lex 60, l. 23*, *Benham v. Un. Guar. &c.*, 7 Exch. 744. sect. 7.

fect sincerity. (d) "Nothing but what is plainly injurious to good faith ought to be considered as a fraud sufficient to impeach a contract: *dolum non nisi perspicuis indicis probari convenit.*" (e)

False Representation through a Third Party.—Where the defendant, in the course of a negotiation for the sale of a public-house, made a false and fraudulent representation to one Bourner as to the receipts of the house, and thereby induced Bourner to agree to buy it, and Bourner, being unable to complete the purchase, got the plaintiff to take his contract off his hands by * repeating to him the false representation made by [* 993] the defendant, and the defendant then carried out the bargain with the plaintiff, and took the plaintiff's money, knowing that the false and fraudulent representation had been communicated to the plaintiff, and that he was acting under the influence of it, it was held that the plaintiff was entitled to sue the defendant for the deceit, although the false representation had not been made to him directly by the defendant, but through the medium of a third party. "The defendant," observes Bosanquet, J., "knowing that the fraudulent representation he had made to Bourner had been communicated to the plaintiff, with whom he was about to contract, and withholding an explanation or denial of Bourner's authority for the communication, and suffering the plaintiff on the faith of that communication to enter into the contract, was as much guilty of a deceit on the plaintiff as if he had in terms repeated the statement himself." (f)

Fraudulent Breach of Warranty.—Whenever the representation or statement amounts to a warranty of the fact stated, and is untrue, it is fraudulent, in contemplation of law, whether there was knowledge or want of knowledge of the untruth on the part of the person making it. "If one man," observes Lord Ellenborough, "lull another into security as to the goodness of a commodity he offers for sale, by giving him a warranty of it, it is the

(d) Domat, liv. 1, tit. 18, s. 3, sect. 2. of fraudulent misapprehension, see *post*,

(e) Poth. *Obligations*, No. 30. As to pp. *1173, *1178.

the avoidance of contracts on the ground (f) *Pilmore v. Hood*, 5 B. N. C. 109.

same thing whether or not the seller knew it at the time to be unfit for sale: the warranty is the thing which deceives the buyer who relies on it, and is thereby put off his guard, and it is sufficient to prove the warranty broken to establish the deceit." (g) If, therefore, a watchmaker warrants a watch to go well, or a horse-dealer warrants his horse to be sound, or quiet and free from vice, or a wine-merchant warrants his claret to be in a fit and proper state for exportation, or a copper manufacturer warrants his copper to be fit for sheathing vessels, and a purchaser buys upon the faith of the warranty, and then finds that the watch will not go, or that the horse is unsound or vicious, or that the claret is sour, or that the copper is unfit for sheathing, this is a fraud, though neither the watchmaker, the horse-dealer, nor the copper manufacturer was aware of the fact at the time he gave the warranty. (h)

The purchaser of a warranted but worthless article is entitled to maintain an action for deceit, although he has stipulated that if he dislikes the article, it shall be exchanged for another of the same value. (i)

[* 994] ***Counterfeiting Trade-Marks — Fraudulent Use by one Person of the Trade-mark of Another with Intent to deceive.** — If a manufacturer has adopted a particular mark to denote that the goods so marked were made by him, and the mark has become known and understood in the trade, he who uses the mark for the purpose of deceiving purchasers and making them believe the goods to be the goods of the manufacturer who has introduced the mark, is guilty of a false and fraudulent representation, and if this produces damage to another, the person injured is entitled to an action for the deceit. (k) Where "a clothier in Gloucestershire sold very good cloth, so that in London if they saw any cloth of his mark they would buy it without searching thereof; and another who made ill cloth put the Gloucestershire mark upon it, and an action was brought

(g) *Williamson v. Allison*, 2 East, 450. 2 C. & P. 540; *Williamson v. Allison*, 2 East, 446.

(h) *Wallace v. Jarman*, 2 Stark. 162; *Anon.*, Loft, 146; *Gresham v. Postan*,

(i) *Wallace v. Jarman*, 2 Stark. 162.
(k) *Crawshay v. Thompson*, 4 M. & Gr. 386, n.

by him who bought the cloth for this deceit, it was adjudged maintainable." (l)

Fraudulent Concealment.—If a vendor has resorted to any contrivance for the purpose of concealing any defect in the subject-matter of a contract of sale, the purchaser may avoid the contract on the ground of fraud; but the vendor is not bound to point out defects which may be seen on examination. (m) It has been held that there was a fraudulent concealment vitiating a contract of sale in the following cases: where a partner who had the exclusive management and control of the partnership business agreed to purchase the share of his co-partner, but kept back from the knowledge of the latter the true state of the accounts and of the amount of profit realized, and by that means effected the purchase for a less sum than would have been taken if the state of the partnership had been fully disclosed and fairly stated; (n) where the purchaser of a policy of insurance, having secret information of the alarming illness and imminent danger of death of the party on whose life the policy had been effected, treated with an assignee of the policy for the purchase of it without disclosing the condition and state of health of the assured; (o) where the vendor of a mare stated, at the time of sale, that he believed the mare to be sound, but would not warrant, and the mare was at the time unsound to his knowledge; (p) where the vendor of pimento, knowing it to be sea-damaged, sold it without disclosing the fact to the purchaser, there being a custom of the trade to disclose such defects at the time of the sale; (q) where the agent of the vendor of a picture, knowing that he had induced the purchaser *to [* 995] labor under a delusion with respect to the picture, which materially influenced his judgment as to the value of it, permitted him to purchase without removing the delusion. (r) But

(l) 33 Eliz., cited by Dodderidge, J.,
Cro. Jac. 471.

(m) Horsfall v. Thomas, 1 H. & C.
98; 31 L. J. Ex. 322.

(n) Maddeford v. Austwick, 1 Sim.
89.

(o) Jones v. Keene, 2 Mood. & Rob.
350.

(p) Wood v. Smith, 5 M. & R. 124.

(q) Jones v. Bowden, 4 Taunt. 847.

(r) Hill v. Gray, 1 Stark. 434; see
the observations on this case by Jervis,
C. J., Keates v. Earl Cadogan, 20 L. J.
C. P. 78.

the vendor is not bound to inform the purchaser that the latter is under a mistake, where such mistake is not induced by the act of the vendor. Thus where the plaintiff offered to sell some oats to the defendant, and the defendant agreed to buy them, supposing them to be old oats, but the plaintiff did nothing to induce the defendant to suppose so, it was held that the sale was valid. (s) If the defect is patent, and can readily be discovered by proper examination, and the purchaser has the means of examination at hand, there is no fraudulent concealment, and the maxim of *caveat emptor* will apply. But the vendor must in no case resort to any art or contrivance to conceal a defect, for if he does he will be answerable, as we have just seen, for wilful deceit. "If I sell a horse that has lost an eye, no action lies against me for so doing; but if I sell him with a false and counterfeit eye, there an action lieth." (t) If the vendor of a glandered horse has resorted to any doctoring or contrivance for the purpose of suppressing the marks of the disease, and has thereby deceived the purchaser, the latter will be entitled to recover all the damages he has sustained by the deception. (u)

In sales of manufactured articles and provisions, if the vendor is cognizant, at the time he sells the articles, of latent defects materially lowering their value, and rendering them totally unfit for the purpose for which they are known to be required, and neglects to disclose such defects to the purchaser, he is guilty of a fraudulent concealment. (x) But in a general sale of a horse, the vendor is not bound to disclose any unsoundness in the animal, although he may be aware of its existence; and if the purchaser makes no inquiries as to its soundness or qualities, and the vendor has said or done nothing to throw the purchaser off his guard or to conceal a defect, there is no fraudulent concealment on the part of the vendor. (y) The purchaser has an opportunity of inspecting and judging of the animal himself, and the principle of *caveat emptor* applies. The damage, however, resulting from the spread of infectious and contagious dis-

(s) *Smith v. Hughes*, L. R. 6 Q. B. 597; 40 L. J. Q. B. 221.

(x) *Ante*, p. *913; *Fitz. N. B.* 94, C.

(y) *Jones v. Bright*, 3 Moo. & P.

(t) *Southerne v. Howe*, 2 Roll. 5. 175; *Fitz. N. B.* 94, C.; *Hill v. Balls*, 2

(u) *Mullet v. Mason*, L. R. 1 C. P. 559. H. & N. 299; 27 L. J. Ex. 48.

orders amongst sheep and cattle is so serious, that every vendor who sells an animal, knowing it to be laboring under a highly contagious or infectious disorder, * ought to be [* 996] held responsible for fraudulent concealment, if he fails to disclose the fact at the time he makes the bargain. (z) Where a statute prohibited persons from sending animals affected with a contagious disease to market, and inflicted penalties on any person so sending them, the act of sending them, if known to be so infected, was a public offence, but did not amount by implication to a representation that they were sound, and did not of itself raise, as between the vendor and purchaser, any right on the part of the latter to claim damages arising from loss of his own animals by the spreading of the disease. (a)

Sales "with all Faults." — If it be made a term of the contract that the subject-matter of the sale is to be taken with all faults, the stipulation will release the vendor from the obligation of disclosing all such defects as are susceptible of discovery by a rigid examination of the subject-matter of the sale. (b) If the vendor is not to be responsible for any defect or "error," the stipulation will protect him from all unintentional misdescription and misstatement. Therefore, where a shipowner advertised for sale "the fine teak-built barque, *Intrepid*, A 1, as she now lies in dock, well adapted for a passenger-ship," but stipulated that the vessel was to be taken with all faults, without any allowance for any defect or error whatever, and it turned out that the barque was not teak-built, nor of class A 1, nor adapted for a passenger-ship, it was held that, as the defendant distinctly stated that he would warrant nothing, the advertisement must be taken as a mere description of the vessel, and that the real meaning of the contract was this, — There is the vessel in dock,

(z) *Blakemore v. Brist. & Ex. Ry. Co.*, 8 Ell. & Bl. 1051; *Anderson v. Buckton*, 1 Str. 192. By the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), extensive powers are given to the Privy Council and the local authority to enable them to deal with animals suffering from contagious diseases. See sects. 27-45. This act repeals the 32 & 33 Vict. c. 70, except that it does not affect the past operation of that act, nor interfere with the course of any proceeding commenced under that act, nor take away any protection or benefit under that act. *Cullen v. Trimble*, L. R. 7 Q. B. 416.
 (a) *Ward v. Hobbs*, 4 Ap. Cas. 13.
 (b) *Pickering v. Dowson*, 4 Taunt. 779.

I describe her as A 1, and call her a teak-built barque; I do not mean to warrant anything. Go and look at her, and examine and judge for yourself; and if you take her, you take her with all her faults, without any allowance for any error or misdescription on my part. (c)

But an agreement "to take a thing with all faults does not mean that it is to be taken with all frauds;" and the stipulation will be of no avail to the vendor, if he has knowingly [* 997] and wilfully * misled the purchaser, or thrown him off his guard by a wilful and intentional false representation, or has resorted to any art or contrivance to conceal a defect. Thus where the owners of an unseaworthy vessel, whose hull was worm-eaten and keel broken, removed the vessel from the ways where she lay dry, and where the state of her bottom and keel might easily have been discovered, and kept her afloat in deep water, where her defects were completely concealed, and then issued a printed advertisement of the sale of the vessel, which described the hull as being nearly as good as when launched, but stated that it was "to be taken with all faults," it was held that, as the vendors had knowingly given a false representation of the state of the vessel, and attempted to conceal the defects in the hull, and to throw the purchaser off his guard, they could not shelter themselves under the stipulation that the vessel was to be taken with all faults. (d) Where the vendor of a vessel, "to be taken with all faults," knowingly represented the vessel in his handbills and advertisements as having been built in 1816, in order to get an increased price, whereas she had been launched in 1815, it was held that this was a fraud. "The vendor," observes Abbott, C. J., "ought to be silent, or to speak the truth. In case he spoke at all, he was bound to disclose the real fact." (e) If the defect, moreover, is of such a nature that a purchaser cannot, by the most diligent examination, discover it, and the defect is known to the vendor at the time of the sale, the latter ought not, according to the

(c) *Taylor v. Bullen*, 5 Exch. 779; (d) *Schneider v. Heath*, 3 Campb 20 L. J. Exch. 21; see *Ward v. Hobbs*, 508.
ante, p. * 971. (e) *Fletcher v. Bowsher*, 2 Stark. 561.

opinion of Lord Kenyon, to be permitted to shelter himself from the consequences of a fraudulent concealment under a stipulation that the thing is to be taken with all faults. (*f*) According to Lord Ellenborough, however, "if an article is sold with all faults, it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burthen of examining all faults, both secret and apparent." (*g*) An examination, however, is useless if the defect is of such a nature that it cannot be detected by any examination, however careful; and a vendor who, knowing this, sells with all faults for the purpose of exonerating himself from liability to disclose the secret defect, seems to make use of the stipulation, "to be taken with all faults," in order to cover the perpetration of a fraud. (*h*) In the case of *Mellish v. Motteux*, (*i*) which has been disapproved * of by Lord Ellenborough, (*k*) the [* 998] twenty-two broken futtocks of the vessel were concealed only by the ballast. The defect was disclosed as soon as the ballast was taken out after the sale, and might have been easily discovered before the sale by a diligent and careful examination of the vessel. It is, therefore, wrongly described as "a defect which the purchaser could not, by any attention, possibly discover." The question whether the ballast had been put there for the purpose of concealing the defect does not appear to have been raised.

When the Purchaser disables Himself from avoiding the Contract. — When a contract of sale is voidable at the option of the party defrauded, the latter must, when he exercises his option to avoid the contract, be in a situation to restore the subject-matter of the sale to the vendor. If he has kept the article an unreasonable time, or changed the nature of it so that he cannot restore it in the same state it was in when bought, he cannot avoid the

(*f*) *Mellish v. Motteux*, 1 Peake, 157.

(*g*) *Baglehole v. Walters*, 3 Campb. 155, 156.

(*h*) *Sugd. Vend. & Pur.* 386, 387.

(*i*) *Mellis v. Motteux*, 1 Peake, 156.

(*k*) *Baglehole v. Walters*, 3 Campb. 156.

contract, but must resort to his cross-action. (*l*) Thus where a log of mahogany was sold on the faith of a representation that the log was sound throughout, and the representation was fraudulently made, but the fraud was not discovered until the log had been cut through by the purchaser, it was held that the latter, by cutting the log, had made it his own property, and could not afterward return it to the vendor. (*m*)

When a Vendor is prevented from avoiding a Contract of Sale induced by the Fraud of a Purchaser.—If a vendor has parted with the possession of goods in fulfilment of a contract of sale, obtained by fraud on the part of the purchaser, he cannot, after the goods have been resold and passed into the hands of a *bona fide* sub-purchaser, disaffirm the contract and annul the title of the latter to the property; for where one of two innocent parties must suffer, it is considered to be more just that the burthen should fall upon the vendor, who parted with his goods, rather than upon the *bona fide* sub-purchaser, who trusted to the actual possession of them by the party with whom he dealt. (*n*) But if the relation of vendor and vendee does not subsist between the original owner and the person who commits the fraud, and the goods have been obtained by false pretences in such a way as not to transfer the property in them, and afterward disposed of to a *bona fide* purchaser by sale not in market overt, [* 999] the latter does *not acquire a title to the goods as against the person who has been defrauded. (*o*)

Determination of the Election to avoid a Contract.—When a party has a right to determine or annul a contract on the ground of fraud, or to rely upon it and treat it as a subsisting contract, he must make his election within a reasonable time, and the election when once made is final, and cannot be retracted. (*p*)

(*l*) *Clarke v. Dickson*, Ell. Bl. & Ell. 154; *Urquhart v. Macpherson*, 3 Ap. Cas. 831; *Tenant v. City of Glasgow Bank*, 4 Ap. Cas. 615.

(*m*) *Udell v. Atherton*, 7 Jur. N. S. 777.

(*n*) *White v. Garden*, 10 C. B. 927; *Sheppard v. Shoolbred*, Car. & M. 63; *Moyce v. Newington*, 4 Q. B. D. 32;

Attenbro' v. St. Katherine's Docks, 3 C. P. D. 450, C. A.

(*o*) *Higgon's v. Burton*, 26 L. J. Ex. 342; *Kingsford v. Merry*, 1 H. & N. 503; *Cundy v. Lindsay*, 3 Ap. Cas. 459, and see as to sale in market overt, *Addison on Torts* (5th ed., by Cave), p. 415.

(*p*) *Post*, p. *1178.

Sales rendered nugatory from Want of Title¹ — Recovery of Purchase-Money. — There may be no implied warranty of title on the part of a vendor, and yet the purchaser may be entitled to recover back the purchase-money on the ground of a total failure of consideration. Thus in the case of a sale of stock, scrip, or shares in joint-stock companies, the law does not imply any undertaking or warranty from the vendor that the scrip, stock, or shares he sells are genuine; but if the vendor has innocently sold forged or counterfeit stock, scrip, or shares, the purchaser is entitled, as we have seen, to a return of the purchase-money, on the ground that there has been a total failure of consideration. (q) Where the plaintiff succeeded the defendant as the tenant of a dwelling-house, and agreed with him for the purchase of the tenant's fixtures in the house, and paid him the purchase-money, and it subsequently appeared that the fixtures belonged to the landlord, and that the tenant had no right to sell them, and the plaintiff was obliged to pay the value of them to the landlord, it was held that he was entitled to recover back the money he had paid to the defendant, on the ground that there had been a total failure of the consideration, and that the money had been paid under a mistake, although it appeared that the defendant had himself bought the fixtures *bona fide* of a preceding tenant in ignorance of the title of the landlord. (r)

But if the vendor does not pretend himself to be the owner of the goods he sells, but sells only such a title and interest as the law gives him in the subject-matter of the sale, the purchase-money cannot be recovered back on the ground of a failure of the consideration, if it turns out that the vendor had not the title or interest which he was supposed to have, unless the vendor knew of his want of title at the time of the sale, and there has been a fraudulent concealment (*ante*, pp. * 992—* 998). Where the plaintiff and defendant both attended a sheriff's sale where goods seized * under a writ of execution [* 1000]

¹ See *Williams v. Merle*, 11 Wend, 80, 25 Am. Dec. 604, and note by A. C. Freeman, *ib.* 605; article on Title from fraudulent vendees of chattels, by J. M. Grant, 7 South. L. Rev. N. S. 549.

(q) *Westropp v. Solomon*, 8 C. B. 129; *Leeman v. Lloyd*, *Wilkinson v. Lloyd*, 7 Q. B. 43; 14 L. J. Q. B. 165.

(r) *Robinson v. Anderton*, 1 Peake,

dent, the loss will be the loss of the vendor. (a) It does not follow that the contract is rescinded and put an end to by the return of the thing sold, although its return and acceptance are circumstances from which a jury would be at liberty to infer that the contract had been dissolved by the mutual agreement of the parties. (b)

Breach of Warranty — Damages. — If a vendor sells property absolutely as owner, and warrants his title and right of possession to the purchaser, and the purchase-money is paid, and after that the warranty is broken and the purchaser evicted and deprived of the possession and enjoyment of the thing sold, the measure of damages is the highest marketable value of the article between the time of eviction and the day of trial. If the purchaser brings his action against the vendor for a breach of warranty of the quality or soundness of the thing sold, [* 1002] expressly * or impliedly made at the time the contract of sale was entered into, and the goods have been received back by the vendor (*ante*, pp. * 988—* 991), the measure of damages is the marketable value which the goods would have possessed in the hands of the purchaser at the time of the delivery, if they had corresponded with the warranty given. If they have not been returned by the purchaser, the measure of damages is then the difference between their marketable value to the purchaser in their defective state at the time of delivery, and the value they would have possessed had they answered the warranty; and if they have been resold by the purchaser without delay, and before any considerable fluctuations in the market have taken place, it is the difference between the price realized on the resale, after deducting the costs and expenses of the resale, and the price they would have fetched if they had answered the warranty.

Where goods had been purchased with a warranty in England, to be exported and resold in China, and the goods on their arrival in Canton were found not to answer the warranty, the measure of damages was held to be, not the difference between the agreed price and the price realized on the resale in China, but between the last-named price and what they would have sold

(a) *Okell v. Smith*, 1 Stark. 107.

(b) *Long v. Preston*, 2 Moo. & P. 262.

for in the Chinese market, had they corresponded with the warranty. (c) And where a horse-dealer purchased horses in Wales with a warranty of soundness, with a view of reselling them at a profit in the London market, and the horses on their arrival in London were found to be unsound, the fair measure of damages was held to be the difference between their marketable value in London as unsound horses, and what would have been their marketable value if they had been sound and had corresponded with the warranty; and it was also held that if any of them had been resold in London with a warranty before the unsoundness was discovered, the price realized on such resale would be evidence of their marketable value in a sound condition corresponding with the warranty; and if they were subsequently returned and sold a third time as unsound horses without a warranty, the price realized on such third sale would be evidence of their actual marketable value in an unsound state; and the difference between the price realized on the two sales would be the measure of the damages fairly recoverable from the original vendor as resulting from his breach of warranty. If the purchaser estimated his damages according to the last-named standard, he would not, of course, be entitled to recover the costs, charges, and expenses of bringing the animals up from Wales; but if he recovered only the difference between the price paid * in Wales and the actual value of the horses in their [* 1003] unsound condition, he would be entitled to recover the costs and expenses of bringing them up to market. The expenses of obtaining a certificate of unsoundness from the veterinary college cannot be recovered from the vendor, nor can any legal expenses which were not the necessary result of the defendant's breach of contract. (d) If the purchaser, as soon as he has discovered the unsoundness of a horse, and consequent breach of warranty, tenders back the horse to the vendor, he may recover the expense of the keep during the time that he is preparing to resell the animal to the best advantage. (e)

(c) *Bridge v. Wain*, 1 Stark. 504; P. 744, cited 6 Ad. & E. 523; *Curtis v. Chesterman v. Lamb*, 2 Ad. & E. 129. Hannay, 3 Esp. 82.

(d) *Clare v. Maynard*, 7 C. & P. 741; (e) *Caswell v. Coare*, 1 Taunt. 566; 6 Ad. & E. 523; *Cox v. Walker*, 7 C. & Cross v. Bartlett, 3 M. & P. 543; Mac-

Special Damages — Resale with a Warranty — Costs of Legal Proceedings. — If special damages have been sustained by the purchaser, they may be recovered from the vendor (*ante*, p. * 1104). Thus where the plaintiff, having bought of the defendant a horse warranted sound, resold the horse with a like warranty, and was sued for a breach thereof by the second purchaser, and then gave the defendant notice of the action, and offered him the option of defending it, but the defendant gave no answer, and the plaintiff failed in the action and had to pay damages and £88 costs, it was held that he was entitled to recover these costs, in addition to the damages he had been compelled to pay to his immediate purchaser. (*f*) So where the defendant sold the plaintiff a picture warranted to be painted by Claude, and the plaintiff afterward resold the picture with a like warranty, and the picture turned out not to be a Claude, and the second purchaser sued the plaintiff for the breach of warranty, and recovered a certain sum for damages and costs, and the plaintiff then sued the defendant, it was held that he was entitled to recover the amount of the damages and costs paid to the second purchaser, and also his own costs incurred in defending the action brought by the latter. (*g*) But if the plaintiff has made a rash and improvident defence, — if, for instance, he has had an opportunity of testing the thing purchased, and might have ascertained by examination whether it did or did not correspond with the warranty, and has neglected so to do, and runs his chance of an action, he will not be permitted to recover the cost of his defence. (*h*) But where the purchaser is justified in defending the action brought against him [* 1004] by a * sub-purchaser, it would seem that he is entitled to recover his costs as between solicitor and client, and not merely as between party and party. (*i*)

kenzie v. Hancock, R. & M. 436; *ante*, pp. * 988, * 999.

(*f*) *Lewis v. Peake*, 7 Taunt. 153.

(*g*) *Pennell v. Woodburn*, 7 C. & P. 118; *Dingle v. Hare*, 7 C. B. N. s. 157; 29 L. J. C. P. 143; *Randall v. Raper*, *post*, p. * 1109; *Hughes v. Græme*, *ante*, p. * 68.

(*h*) *Wrightup v. Chamberlain*, 7 Sc. 598.

(*i*) *Howard v. Lovegrove*, L. R. 6 Ex. 43; 40 L. J. Ex. 13, commenting on *Grace v. Morgan*, 2 Sc. 793; 2 Bing. N. C. 534.

Increased Customs Duty upon Goods warehoused added to Price.—By the Customs Laws Consolidation Act, 1876, (*k*) when any increase, decrease, or repeal takes place after the making of a contract for sale, or delivery of goods duty paid, the seller in case of increase may add so much money to the contract price, and the purchaser in case of decrease or repeal may deduct it.

Sale and Transfer of Tenant's Fixtures and Trade Fixtures.—If an article affixed to the freehold is sold with a view to its immediate severance therefrom, the contract is simply a contract for the purchase and sale of a chattel. If it is not purchased with a view to immediate severance, the contract is then a contract for the sale and purchase of a fixture. A contract for the sale and fixing up in a dwelling-house of a copper or a stove is not a contract for the sale of fixtures, but of goods and chattels, and for the performance of work and labor. If a contract is made for the erection upon the soil, or in a dwelling-house, of machinery, presses, &c., the contract is properly a contract for work and labor and the supply of materials. It is a contract for the erection, and not for the sale, of a fixture, and is the same in principle as a contract to erect a pillar or build a house. (*l*)

Authentication of Contracts for the Sale of Fixtures.—We have already seen that a contract for the sale of fixtures is not a contract for the sale of an interest in land, nor for the sale of goods and chattels (*ante*, p. *165). A signed writing, consequently, is not necessary, as between vendor and purchaser, for the authentication of the contract. Where fixtures have been sold at a price to be ascertained by valuation, if after the valuation has been made and delivered to the purchaser, the latter takes possession of the fixtures, or exercises dominion over them, he will be deemed to have adopted the valuation and assented to the price as ascertained by the brokers. (*m*)

(*k*) 39 & 40 Vict. c. 36, sect. 20.

(*l*) *Pinner v. Arnold*, 2 Cr. M. & R. 616.

(*m*) *Salmon v. Watson*, 4 Moore, 73.

[* 1005]

* SECTION III.

OF CONTRACTS FOR THE SALE OF INCORPOREALS.

Grants and Transfers of Incorporeal Rights and Incorporeal Hereditaments,¹ such as rights of common, rights of way or watercourse, advowsons, tithes, rents, annuities, and profits

¹ As to all matters pertaining to the sale of securities upon the stock exchange, consult Dos Passos, *Stockbrokers* (1882), particularly c. 3, Analysis of transaction between broker and client upon purchase or sale of stocks in the United States; c. 9, Negotiability and non-negotiability; c. 10, Remedies (which includes Specific Performance, Mandamus, and Statute of Frauds); c. 11, Measure of damages; Biddle, *Stockbrokers* (1882), particularly Part II., The sale, pp. 138 to 320; Lewis, *Stocks* (1881), particularly c. 2, The effect of exchange usages on stock contracts; c. 3, Method of transfer. Blank powers: c. 4, Negotiability of stock certificates; c. 10, Specific performance; and c. 11, Measure of damages. See, also, 1 Schouler, *Pers. Prop.* 617-653.

As to bonds or obligations issued by the Government, or by State, City, Town, or other municipal authorities, see, further, Burroughs, *Public Securities* (1881), particularly c. 4, Negotiability; c. 5, 6, Municipal bonds; c. 6, Mode of issuing and form of bonds; registered bonds; c. 8, Rights of *bona fide* holders; c. 13, Abstract of decisions in the Supreme Court of the United States relating to municipal bonds; c. 14, Abstracts from the constitutions of the States affecting the validity of municipal bonds.

As to railroad and other corporate securities, including municipal-aid bonds, see Jones, *Railroad Securities* (1879); also, Clemens, *Corporate Securities* (1877); 2 Daniel, *Negot. Instr.* (3d ed. 1882), c. 47, Coupon bonds; c. 48, Validity of municipal bonds; c. 52, Certificates of stock; Pierce, *Railroads* (1881), c. 5, The capital stock; Coler, *Municipal Bonds*, containing a chapter upon the law of each State in the Union.

See, also, Angell & Ames, *Corp.* (11th ed. 1882) particularly c. 16, Of the nature and transfer of stock in joint incorporated companies; Morawetz, *Private Corporations* (1882), particularly c. 4, Part VI. Transfers of shares; Field, *Corp.* (1877) particularly c. 5, Members, stock-holders and stock; Potter, *Corp.* (1877) particularly c. 10, Character and transfer of stock; Abbott, *Dig. Corp. and Supplement*, tit. *Stock*; *Cherry v. Frost*, 21 Am. L. Reg. n. s. 57, and note by F. A. Lewis, Jr., ib. 63.

Upon sale of a goodwill of a business, see article by A. S. Biddle, 14 Am. L. Reg. n. s. 329; ib. 649; ib. 712; *Porter v. Gorman*, 65 Ga. 11; *Poland v. Brownell*, 131 Mass. 138.

How far a seat in a broker's board may be a subject of sale, see *Hyde v. Woods*, 94 U. S. 525; *Thompson v. Adams*, 93 Pa. St. 55; *Pancoast v. Gowen*, ib. 67; *Smith v. Barclay*, 21 Am. L. Reg. n. s. 408, and note by M. D. Ewell, ib. 413; *Powell v. Waldron*, 26 Alb. L. J. 32; *Ritterband v. Baggett*, 42 N. Y. Superior Ct. 556; *Grocers' Bank v. Murphy*, 11 N. Y. Week. Dig. 538; Passos, *Stockb.* 96.

issuing out of land, must, in order to be valid and irrevocable at common law, be made by DEED. (a) Thus a right to take tolls for the passage of a ferry or a bridge must be transferred by deed. (b) A right to go upon another man's land, as to remove fixtures, (c) or to shoot and sport over a manor, or to fish in the waters thereof, whether it be a mere license of pleasure authorizing the licensee to take, but not to carry away, or a license of profit, authorizing him both to take and carry off the game or the fish, is an incorporeal right lying in grant, and can only be created by deed. (d) A parol license or permission will, so long as it has not been countermanded, justify an entry upon the land; (e) but it can confer no indefeasible right, and may be recalled at the pleasure of the grantor, unless a valuable consideration has been given and received for it, so as to give the licensee a right to the enjoyment of the privilege. But although the right itself cannot be created at common law, so as to be indefeasible, without deed, yet a landowner may, by a writing satisfying the statute of frauds, agree to allow another to come upon his land and take a profit from the soil, or to exercise and enjoy thereon certain privileges, and will be responsible in damages if he interrupt such enjoyment. (f) And if a landowner gives a parol license or permission to another to enjoy some profit or privilege on the land of the licensor necessarily involving the expenditure of money for its enjoyment, and the licensor stands by and allows the licensee to expend his money on the land in reliance on the promised enjoyment of the privilege, the license cannot afterward be withdrawn without tendering the licensee compensation for his expenditure. (g) Where a colliery proprietor, wanting to construct a railway across the defendant's land, wrote a letter to the * defendant, offering him a [*1006]

(a) *Bac. Abr. Grants* (E); *Co. Litt. Higginson*, 2 Ad. & E. 696; *Thomas v. 9 a*, 42 a; 14 *Vin. Abr. Grant* (G) (a); *Fredericks*, 16 L. J. Q. B. 393; *Ewart v. Graham*, 7 H. L. C. 331; 29 L. J. 12 Jur. 308. Ex. 88.

(b) *Reg. v. Marquis of Salisbury*, 8 Ad. & E. 739. (e) *Feltham v. Cartwright*, 7 Sc. 695.

(c) *Ruffey v. Henderson*, 21 L. J. 717; 33 L. J. C. P. 154. (f) *Smart v. Jones*, 15 C. B. n. s.

(d) *Duke of Somerset v. Fogwell*, 5 B. & C. 875; 8 D. & R. 747; *Bird v.* (g) *Ramsden v. Dyson*, L. R. 1 H. L. 170; *Clavering's case*, 5 Ves. 690.

fair price for the land, and getting no answer to his letter, and supposing that he had a right, under the powers of a local act, to make the railway, entered upon the defendant's land, and constructed earthworks and formed a railway, and used it for three or four years with the acquiescence of the defendant, and the parties afterward met to settle the price that was to be paid for the land, and not being able to agree upon it, the defendant brought an action of ejectment, the Court of Chancery granted an injunction to restrain the defendant from obstructing or interfering with the plaintiff's use of the railway, on such a sum of money being paid into court as would constitute a sufficient security to the defendant for the price of the land. (*h*) So also, when a party has agreed to pay a certain sum for a license of profit, and has had the benefit and enjoyment of the license, it is no answer, in an action for the money agreed to be paid, to say that the license was not under seal. Therefore where an action was brought for a sum of money agreed to be paid for the use and enjoyment of a license to fish, it was held that the defendant could not resist the action on the ground that the license was not under seal. (*i*) And where the defendant, by memorandum in writing, agreed with the plaintiff, for a valuable consideration, to permit the plaintiff to enter upon the defendant's land for the purpose of gathering cinders, it was held to be no answer to an action for a breach of this agreement, to set up that it was not under seal. (*k*) A parol license to enjoy an easement over or upon the soil and freehold of another is at once determined by a transfer of the property; and the grantee of the license is consequently a trespasser, if he afterward enters upon the land in the exercise and enjoyment of his supposed right, although he has received no notice of the transfer. (*l*)

A mere license of pleasure amounts only to a personal contract, or to an ordinary covenant between the parties, and does not transfer to the licensee or his heirs any right over, or interest in, the soil and freehold of the licensor. "If one license me and

(*h*) *Powell v. Thomas*, 6 Hare, 300; (*i*) *Wallis v. Harrison*, 4 M. & W. 539; *Russell v. Harford*, L. R. 2 Eq. 507; *Roberts v. Rose*, L. R. 2 Ex. 82; *Laird v. Birkenhead Railway Company*, 1 Johns. 500; 29 L. J. Ch. 218.

(*j*) *Holford v. Pritchard*, 3 Exch. 793. 35 L. J. Ex. 62.

(*k*) *Smart v. Jones*, *ante*, p. * 1005.

my heirs to come and hunt in his park, I must have a writing (that is a deed) of that license; for a thing passes by the license which endures in perpetuity: but if he license me one time to hunt, this is good without deed; for no inheritance passes." (*m*) If the license be a mere personal license of pleasure, the licensee cannot *take away to his own use the [*1007] game killed, or go with servants upon the land; still less send servants to kill for him, or assign his license to another. A license under seal to convey coals or timber in carts, or water in drains or channels, through or across the land of the licensor, is a license of profit, and not of pleasure, and would amount to a grant of a right of way or of a watercourse. A license under seal may be of such a nature as to operate in respect of some things as a license of pleasure merely, and as to others as a grant of an incorporeal hereditament and a direct transfer of an estate or interest in the land.¹⁰¹

In a contract for the sale and purchase of a patent right, the vendor does not profess to sell a good and indefeasible patent right, but merely such a right as he actually possesses under the patent. (*n*) If, therefore, subsequently to the sale, the patent turns out to be invalid, without any fraud on the part of the vendor, the purchaser has no ground for claiming back his purchase-money. (*o*) A contract for the sale of a patent right may be specifically enforced. (*p*)

Of the Title to Shares in Mining Companies.—The shareholders in joint-stock companies possessed of land are entitled to no direct interest in the land. No part of the realty is held in trust for them; but all they are entitled to is, that the real and personal property held by the company should be used by the company for their benefit. (*q*) A purchaser of shares in a mining company is not entitled to a regular deduction of the title of the vendor of the shares, as on the sale of real estate. The vendor may establish his title by the cost-book or register

(*m*) Year Book, 11 Hen. VII. fol. 86, (*p*) Cogent v. Gibson, 33 Beav. 557.
cited by Parke, B., 7 M. & W. 79. (*q*) Watson v. Spratley, 10 Exch.

(*n*) Hall v. Conder, 2 C. B. n. s. 41; 244; Powell v. Jessop, 18 C. B. 336;
26 L. J. C. P. 138. Walker v. Bartlett, ib. 845; Edwards v.

(*o*) Lawes v. Purser, 6 Ell. & Bl. Hall, 25 L. J. Ch. 82; Caddick v. Skidmore, 3 Jur. n. s. 1185.
935; 26 L. J. Q. B. 25.

¹⁰¹ See Appendix, Vol. III.

of the mine. (r) The partners, in whom the legal right in the mine or minerals is vested by deed of grant, hold the mine and the partnership joint-stock plant and machinery, in trust to exercise the right to search for and obtain minerals, and make a profit for the benefit of the co-adventurers; and it has been held that the shares of this profit, and consequently the shares in the mine, are personal property, which may be bargained for and transferred without note in writing, no interest in the soil passing by the transfer, but only a right to participate in the profits of the mine. When mining shares are sold in the share-market, it is the practice for each party to make a memorandum of the sale in his own book, in the same manner as is made by brokers and jobbers on the Stock Exchange. The vendor [* 1008] afterward hands a certificate of the sale * to the captain or purser of the mine, authorizing him to transfer the shares to the purchaser in the usual way; and the purchaser signs an acceptance of the shares written underneath the certificate of sale, which being presented to the captain or purser of the mine, the name of the purchaser is substituted in the place of the vendor in the cost-book, and the transfer is complete. (s) And as soon as the share or interest in the profits of the concern is transferred by the outgoing shareholder, the latter is released from all liability upon contracts subsequently entered into by the purser or managers of the company. (t)

Title to Shares, Scrip, and Letters of Allotment. — The mere possession of letters of allotment of shares or of scrip certificates of shares in projected railway companies is *prima facie* evidence of ownership and of the power of disposition over them. But in the case of registered joint-stock companies, or companies incorporated by act of parliament, the title to shares is evidenced by production of a certificate of proprietorship and by reference to the register of the shareholders of the company. The directors of every registered joint-stock company and incorporated railway company are directed (25 & 26 Vict. c. 89, sect. 25, and 8 & 9 Vict. c. 16) to cause books to be kept, to be called

(r) *Curling v. Flight*, 5 Hare, 242.

(s) *Watson v. Spratley*, 24 L. J. Ex. 53.

(t) *Harvey v. Kay*, 9 B. & C. 356.

the register of shareholders, and to enter from time to time therein the names, addresses, and occupations of the shareholders in the company; the shares held by them, distinguishing each share by its number; the amount paid on such shares; the date at which the name of any person was entered in the register as a shareholder; and the date at which any person ceased to be a shareholder in respect of any share. (u) Provision is made by the Companies Act, 1862, (x) and by the Railway Acts, for establishing the title to shares in case of the death or bankruptcy or insolvency of shareholders, or the marriage of female shareholders. A certificate of shares is merely a solemn affirmation under the seal of the company that a certain amount of stock stands in the name mentioned in the certificate. A person, therefore, who receives such certificates as an equitable mortgage, must inquire into the title of the intending mortgagor, because if he is only trustee, the intending mortgagee's title will be inferior to that of the *cestui que trust*. (y)

Any person entitled to a share in a registered joint-stock company in consequence of the death, bankruptcy, or insolvency of any shareholder, or in consequence of the marriage of any * female shareholder, or in any way other than [* 1009] by transfer, may be registered as a shareholder upon such evidence being produced as may from time to time be required by the company; and any person who has become entitled to a share in any way other than by transfer, may, instead of being registered himself, elect to have some person to be named by him registered as a holder of such share, by executing to his nominee a deed of transfer of such share, which must be presented to the company with such evidence as they may require of the title of the transferor. (z) Under the Companies Act, 1862, a certificate under the common seal of the company (sect. 31), or the register (sect. 37), is *prima facie* evidence of the ownership of a share. (a)

(u) There is a similar provision as to debenture-holders contained in the 26 & 27 Vict. c. 118.

(x) Sched. Table A.

(y) Shropshire Union Railways Co. v. The Queen, L. R. 7 H. L. 496.

(z) 25 & 26 Vict. c. 89, Table A., Nos. 12-16; Copeland v. North-Eastern Railway Company, 6 Ell. & Bl. 284.

(a) Cornwall, &c. Mining Company v. Bennett, 5 H. & N. 423; 29 L. J. Ex. 157.

Executory Contracts for the Sale of Shares are generally effected by brokers on the Stock Exchange, who enter the transaction in their books, and transmit bought and sold notes to their principals, specifying the number and value of the shares, and the price to be paid for them. Executory contracts for the sale of letters of allotment, scrip, and shares in railway companies, or shares in mining companies, or registered joint-stock companies, do not, as we have already seen, come within the operation of the statute of frauds, as they "are neither an interest in land, (b) nor are they goods and merchandises," (c) within the meaning of that act. But by the 30 Vict. c. 29, contracts for the sale or transfer of any shares, stock, or other interest in a joint-stock banking company constituted under or regulated by any act of parliament, royal charter, or letters patent, issuing shares or stock transferable by any deed or written instrument (except by the Banks of England or Ireland), are null and void, unless they set forth and designate in writing such shares, stock, or interest by the respective numbers by which the same are distinguished on the register or books of the company. Where there is no register of shares or stock by distinguishing numbers, the contract must set forth the person in whose name such shares, stock, or interest stand as the registered proprietor in the books of the company. When a bargain has been made for the sale of a certain number of ascertained shares in a particular railway company or a registered joint-stock company, the property in the shares passes by the bargain to the purchaser, and the latter becomes the equitable owner of the shares, and is entitled to a decree for specific performance, when the time for the making of the transfer arrives. (d)

[* 1010] * This transfer of the equitable ownership is naturally accompanied with a transfer of the benefit and the burthen incident to the holding of the shares, as in the case of the transfer of the equitable ownership of lands and tenements, so that, if a call is made on the shares between the time of the

(b) *Humble v. Mitchell*, 11 Ad. & E. 205; *Bradley v. Holdsworth*, 3 M. & W. 422.

(c) *Knight v. Barber*, 16 M. & W. 66; 16 L. J. Ex. 18.

(d) *Duncuft v. Albrecht*, 12 Sim. 199; *Ross v. Moses*, 1 C. B. 227.

making of the bargain and the time appointed for the transfer of the shares, the purchaser will be bound to pay the call, and the court will compel him to accept and register a transfer of the shares, and clothe himself with the legal title to them, and do all proper acts to relieve the vendor from liability as the registered legal owner. (e) If after the making of a bargain for the sale of shares, a dividend is declared, the dividend will belong to the purchaser; (f) for by the custom of the Stock Exchange, the dividend until it becomes payable is included in the price of the share; and if the vendor receives it, he will hold it as a trustee for the purchaser. If, on the other hand, before the transfer is executed, a petition is presented for winding up the company under the Companies Act, 1862, (g) the contract is not rendered void by the 153d section of that act; and if the broker has, in accordance with the rules and regulations of the Stock Exchange, been compelled to pay the price of the shares to the vendor, he will be entitled to recover back from his principal the money so paid. (h)

Agreements for the Transfer of Shares.—If the owner of shares subject to liabilities which deprive them of all marketable value, wishes to divest himself of the shares and the attendant liabilities, and another person is willing to accept the shares, and take the chances of the speculation, and they enter into an agreement for the purpose, the contract will be specifically enforced. (i) But the court will not enforce an agreement to purchase, made after the presentation of a petition to wind up a company, but before advertisement, by making the purchaser a contributory, when both parties were ignorant of the pending petition at the time of the agreement. (k) A transfer of shares which is otherwise *bona fide*, cannot be set aside at the instance of the company, either because the vendor paid money to the purchaser to take the shares, or because the certificate of

(e) *Ex parte Straffon*, 22 L. J. Ch. 206; *Wynne v. Price*, 3 De G. & S. 310; *New Brunswick Company v. Mugeridge*, 4 Drew, 686.

(f) *Black v. Homersham*, 4 Ex. D. 24.

(g) 25 & 26 Vict. c. 89.

(h) *Chapman v. Shepherd*, L. R. 2 C. P. 228; 36 L. J. C. P. 113.

(i) *Cheale v. Kenward*, 3 De G. & J. 27; 26 L. J. Ch. 784.

(k) *Emmerson's case*, L. R. 1 Ch. 433; 36 L. J. Ch. 177.

transfer contains false representations as to the consideration paid. (*l*)

Mode of Performance. — Where shares are bought or [* 1011] sold * through a broker on the Stock Exchange, the principal enters into an implied contract to sell or buy according to the customs and usages prevalent in that body. (*m*) According to the practice of the Stock Exchange, the broker who buys shares prepares the transfer deed and tenders it to the selling broker for execution, (*n*) and pays the price on the transfer being returned to him executed by the vendor and accompanied by the vendor's certificates of proprietorship. Generally, there are intermediate sales, and in that case the first purchaser on a day before the selling-day, called the name-day, gives to the vendor's broker the name of an ultimate purchaser to whom the shares are to be transferred. The vendor's broker thereupon prepares a deed of transfer to the ultimate purchaser, gets it executed by the vendor, and on the selling-day hands it and the share certificates to the broker of the ultimate purchaser, who pays the price agreed upon between the ultimate purchaser and the jobber, the vendor's broker paying the balance to or receiving it from the broker, as the case may require. When this has been done, the liability of the first purchaser ceases, if the ultimate purchaser is a person to whom no reasonable objection can be made. (*o*) In order to relieve the jobber from liability, the ultimate purchaser, whose name is given on the name-day, must be a person of full age, (*p*) and who is willing to accept and pay for the shares; (*q*) but if such purchaser authorizes his name to be given, he is bound by the acceptance of the transfer and payment of the price by his brokers on his behalf. (*r*) The jobber may, however, agree to guarantee that the ultimate purchaser shall register the transfer; and if he does

(*l*) *Hafod Lead Mining Company*, *Grissell v. Bristowe*, L. R. 4 C. P. 36; *In re, ex parte Slater*, 35 L. J. Ch. 304. 38 L. J. C. P. 10; *Maxted v. Paine*,

(*m*) *Hodgkinson v. Kelly*, L. R. 6 Eq. L. R. 6 Ex. 132; 40 L. J. Ex. 57. 496.

(*n*) *Stephens v. De Medina*, 4 Q. B. 733; 7 H. L. 530. 428.

(*o*) *Paine v. Hutchinson*, L. R. 3 Ch. 388; 37 L. J. Ch. 485; *Coles v. Bristowe*, L. R. 4 Ch. 3; 38 L. J. Ch. 81; 38 L. J. Ex. 41.

(*p*) *Merry v. Nickalls*, L. R. 7 Ch. 733; 7 H. L. 530. (*q*) *Maxted v. Paine*, L. R. 4 Ex. 81; 38 L. J. Ex. 41. (*r*) *Bowring v. Shepherd*, L. R. 6 Q. B. 309; 40 L. J. Q. B. 129.

so, and the transfer is not registered, he will be liable to indemnify the vendor against the consequences of such want of registration. (s) It is not the duty of the vendor or of the selling broker to get the transfer registered; all he has to do is to execute the transfer deed and return it to the purchaser. (t) It is then the duty of the latter to execute it and leave it, with the certificates of proprietorship, at the office of the company for registration and for new certificates of proprietorship to be granted to him in his own name. Until this is done, and the transfer has been registered, and the new certificates granted, the purchaser's * title to the shares is incom- [* 1012] plete. (u) A contract to deliver shares in a projected company does not require the actual delivery of scrip certificates, which are the mere *indicia* of property; but the party contracting to deliver sufficiently performs his engagement when he places the other in the position of being the legal owner of them. (x) It is not incumbent on the vendor to obtain the consent of the directors to the transfer, unless the deed of settlement, or articles of association of the company, make the approval of the directors a condition precedent to the right of the shareholder to transfer his shares. (y) A clause in a deed of settlement, that no shareholder shall transfer his shares except in such manner as the directors shall approve, does not prevent a shareholder from entering into a contract for the sale of his shares; and if such a contract has been entered into, it will be enforced as between the vendor and purchaser, and the latter will be compelled to do all that is necessary to be done by him to obtain the consent of the directors to the registration of the transfer. (z) But the court will not compel the directors to assent, nor will specific performance be decreed where they refuse to do so. (a)

Executory contracts for the sale and purchase of shares in railway and parliamentary works' companies are fulfilled on the part of the vendor by a tender of letters of allotment of shares, if

(s) *Cruse v. Paine*, L. R. 4 Ch. 441; (y) *Wilkinson v. Lloyd*, 7 Q. B. 27; 38 L. J. Ch. 225. *Stray v. Russell*, 29 L. J. Q. B. 115.

(t) *Taylor v. Stray*, 2 C. B. N. S. 195. (z) *Poole v. Middleton*, 9 W. R. 758.

(u) *Stray v. Russell*, 28 L. J. Q. B. 287. (a) *Birmingham v. Sheridan*, 33 Beav. 660; 33 L. J. Ch. 751.

(x) *Hunt v. Gunn*, 13 C. B. N. S. 226.

there are no shares in the market; and the letters of allotment are commonly bought and received as shares upon the Stock Exchange. (b) In the case of the sale of scrip or letters of allotment of shares in projected companies which can be lawfully bought and sold, no right of property in any particular scrip or shares passes to the purchaser until actual delivery; and the vendor will fulfil his contract by procuring and tendering to the purchaser any scrip that may be in the market. (c) But a purchaser is not, of course, bound to accept shares or scrip, or any securities, of a different kind from those he bargained for and agreed to buy. (d)

Time of Performance.—The time for the completion of an executory contract for the sale of shares is regulated by the custom of the Stock Exchange. If particular days are set apart for the settlement of accounts between brokers and [* 1013] their customers, and * for the delivery and transfer of shares that have been agreed to be bought and sold in the intervening period, all contracts for the sale and purchase of shares to be completed on a particular day will be deemed to be made for the next settling day that will arrive after the time so appointed. (e) When no time is specified for the completion of the contract, the printed rules and customs of the Stock Exchange are admissible in evidence to show what is a reasonable time under all the circumstances of the case for the fulfilment of the bargain. (f) Where a written contract for the sale of mining shares was silent as to the time of the delivery of the shares, but fixed the time for payment of the price, it was held that evidence was admissible to show that, by a custom amongst brokers, the vendor under such a contract was not bound to deliver the shares until he had received or was offered payment of the price. (g)

(b) *Stray v. Russell*, 28 L. J. Q. B. 284; *Mitchell v. Newhall*, 15 M. & W. 309; 15 L. J. Ex. 292; *Tempest v. Kilner*, 3 C. B. 249; 15 L. J. C. P. 10; *Lambert v. Heath*, 15 M. & W. 486; 15 L. J. Ex. 297.

(c) *Heseltine v. Siggers*, 18 L. J. Exch. 166; and see *Hunt v. Gunn*, *supra*.

(d) *Keele v. Wheeler*, 7 M. & Gr. 665.

(e) *Fletcher v. Marshall*, 15 M. & W. 755; *Bayliffe v. Butterworth*, 17 L. J. Ex. 79.

(f) *Stewart v. Cauty*, 8 M. & W. 160.

(g) *Field v. Lelean*, 30 L. J. Ex. 169; 9 W. R. 38; overruling *Spartali v. Benecke*, 10 C. B. 212.

Implied Undertakings and Indemnities annexed to Contracts for the Sale and Purchase of Shares — Payment of Calls. —

Where the plaintiff sold mining shares to the defendant, and delivered to him a document addressed to the secretary of the mine, by which the plaintiff requested him to enter a transfer of the shares from his name into that of a transferee, whose name was left in blank that it might be filled up by the holder of the document, and the blank was left in order that the defendant might insert either his own name or that of any other person to whom he might sell the shares, and the plaintiff by delivering this document to the defendant had done all that it was incumbent on him to do to pass the property in the shares to the defendant; who, upon the receipt of it, became potentially the owner of the shares, and might have made his title perfect at any time, it was held that there was an implied contract or undertaking on the part of the defendant to indemnify the plaintiff in respect of all calls that might lawfully be made on the shares whilst they remained untransferred in the books of the company. (*h*) But if the shares are again sold, there is no implied contract of indemnity between the original vendor and those who buy from the first purchaser. The privity of contract, and the attendant liabilities, are confined to those who deal together as vendors and purchasers, and do not extend to parties who are strangers to each other and have never come together in any way. (*i*) But where a man sells or buys shares through his broker on the Stock Exchange, he enters into an

* implied contract to sell or buy according to the custom and usages prevalent in that body; and, therefore, such an implied indemnity does, however, exist where there have been intermediate sales in the manner above described, but the transfer is made by the original vendor direct to the ultimate purchaser, whose duty it then becomes to execute the deed and register the transfer, (*k*) a duty which he may be compelled specifically to perform. (*l*) Where the ultimate purchaser

(*h*) *Walker v. Bartlett*, 18 C. B. 863; (*k*) *Hawkins v. Maltby*, L. R. 4 Ch. 25 L. J. C. P. 263; *Wynne v. Price*, 200; 38 L. J. Ch. 313.
3 De G. & S. 310.

(*i*) *Sayles v. Blane*, 14 Q. B. 205; (*l*) *In re Overend, Gurney, & Co.*, Musgrave & Hart's case, L. R. 5 Eq. 193; 37 L. J. Ch. 161.
19 L. J. Q. B. 19.

gave the name of one of his workmen as the person to whom the shares were to be transferred, and the transfer was executed to the workman, it was held that the master, as the real purchaser and equitable owner, was bound to indemnify the vendor against all subsequent calls in respect of the shares. (*m*) The vendee does not become relieved from his obligation to indemnify his vendor by reselling and transferring the shares to some third person. (*n*)

Rights of Scrip-holders. — Where a defendant had signed the subscription contract of a projected railway company, and had received an allotment of shares with scrip certificates, which he sold before the special act of incorporation of the company had been obtained, and the shares passed through several hands, and the holder neglected to send the scrip for registration, and the company entered the name of the original allottee in the register as the proprietor of the shares, and the latter, apprehending that a call would be made upon him, again sold the shares, it was held that he was bound to pay over to the scrip-holder the amount of the purchase-money. (*o*)

Transfer Deeds. — It is essential to the validity of a deed of transfer of shares that it be duly stamped with the proper *ad valorem* stamp imposed on transfers made upon a sale (*post*, bk. 4), also that the name of the purchaser or party to whom the transfer is to be made, the number and distinguishing marks of the shares, and the price to be paid for them, be inserted in the deed before the execution thereof by the vendor; for material blanks in a deed cannot, as we have seen, be afterward filled up in the absence of the vendor. The rule of law upon this subject cannot be altered or affected by the practice or custom of the Stock Exchange. (*p*) But an error in the transfer in distinguishing the numbers is immaterial, if the transferor has at the time

[* 1015] a *sufficient number of shares. (*q*) Where a vendor of shares executed printed forms of deeds of transfer, in

(*m*) *Castellan v. Hobson*, L. R. 10 Eq. 47; 39 L. J. Ch. 490.

(*n*) *Kellock v. Enthoven*, L. R. 8 Q. B. 458; 9 Q. B. 241; 42 L. J. Q. B. 174; 43 L. J. Q. B. 90.

(*o*) *Beckitt v. Bilbrough*, 19 L. J. Ch. 522.

(*p*) *Hibblewhite v. M'Morine*, 6 M. & W. 200; *Taylor v. Great Indian Peninsular Company*, 4 De G. & J. 559; 28 L. J. Ch. 289; *Swan, Ex parte*, 7 C. B. N. S. 448.

(*q*) *Ind's case*, L. R. 7 Ch. 485; 41 L. J. Ch. 564.

which the number of shares to be sold, the distinguishing marks of those shares, and the names of the transferees, were left in blank, but the stamps which the transfer bore were sufficient in value to cover a transfer of all the vendor's shares, and the broker, after the transfer deed had been delivered to him, fraudulently filled up the blanks with the whole of the vendor's shares, when he had been authorized to sell only a portion, and absconded with the purchase-money, and the fraud was discovered before the transfers had been registered, it was held that the transfers were void; and the Court of Chancery granted an injunction to restrain the registration of the transfers, and prevent any steps being taken to complete the title of the purchaser. (r) Where a broker employed by the plaintiff to purchase shares which the plaintiff paid for, procured the instrument of transfer to the plaintiff and the plaintiff's signature thereto, and received from the plaintiff the certificate and transfer for the purpose of registration, and soon afterward, having fraudulently procured the plaintiff to cancel his signature to the transfer, by means of the cancelled transfer and the certificates, induced the vendor to execute a fresh transfer to himself, and thereupon procured the shares to be registered in his own name, and then mortgaged them, it was held that the effect of the first transfer was not destroyed by the cancellation fraudulently proved, and the registration in the name of the broker and the transfers to his mortgagee were decreed to be set aside. (s)

Where the previous consent of the company is made essential to the validity of a transfer of shares, such consent may be presumed from the conduct and acts of the company, and they may be estopped from disputing it. (t) Transfer deeds of shares generally contain an agreement on the part of the purchaser to take and hold the shares subject to the conditions on which the transferor himself held them, or to hold them subject to the regulations of the particular company. One of these rules generally is that the registered owner shall pay calls. If, therefore, a pur-

(r) *Taylor v. Great Indian Peninsular Ry. Co.*, *supra*; *Swan, Ex parte, supra*; *Swan v. North British Australian Company*, 2 H. & C. 175; 32 L. J. Ex. 273.

(s) *Donaldson v. Gillot*, L. R. 3 Eq. 274.

(t) *Lane, In re*, 33 L. J. Ch. 84.

chaser of shares, after he has executed a deed of transfer, and had the deed delivered to him or to his agent for the purpose of registration, omits to get the deed registered, and the vendor is compelled to pay calls by reason of his name being left on the register, he is entitled to be indemnified by the [*1016] *transferee. (u) A transfer of shares to an infant is not void, but only voidable; and if the infant after arriving at full age affirms the transaction, he cannot afterward avoid it on the ground of his infancy. (x)

Transfers of Shares in Registered Joint-Stock Companies must be in the form given in the schedule to the 25 & 26 Vict. c. 89, Table A, No. 8, and must be executed both by the transferor and transferee. By this form of transfer, the transferee takes the shares subject to the conditions on which the transferor held them at the time of the execution of the transfer. The transferor remains the holder of the shares until the name of the transferee is entered in the register; but if the company makes default or is guilty of unnecessary delay in registering any transfer of shares, it is responsible in damages to the party injured. In the case of a company other than a limited company, every transferee of shares is, in a degree, proportioned to the shares transferred, to indemnify the transferor against all existing and future debts of the company; and in case of a limited company, every transferee is to indemnify the transferor against all calls made, or accrued due, on the shares transferred subsequently to the transfer. By the 25 & 26 Vict. c. 89, sect. 131, it is provided that, whenever a company is wound up voluntarily, the company shall from the date of the commencement of such winding up cease to carry on its business, and that all transfers of shares, except transfers made to or with the sanction of the liquidator, taking place after the commencement of such winding up shall be void. This enactment does not justify the vendor in refusing to execute a transfer, and thereby casting on his broker the liability to furnish other shares to the purchaser. (y)

(u) *Walker v. Bartlett*, 18 C. B. 863, overruling *Humble v. Langston*, 7 M. & W. 517.

(x) *Lumsden's case*, L. R. 4 Ch. 31; 39 L. J. Ch. 124.

(y) *Biederman v. Stone*, L. R. 2 C. P. 504; 36 L. J. C. P. 198.

By sect. 153 of the same act, every transfer of shares made between the commencement of winding up and the order for winding up is void, unless the court otherwise orders. But an agreement for the sale of shares in the specified interval is not void; and the transfer may be executed after the winding-up order has been made. (z)

Registration of Transfers — Payment of Calls. — The Companies Clauses Consolidation Act, 8 Vict. c. 16, enacts (sect. 16) that no shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him; (a) and by the 25 & 26 Vict. c. 89, * schedule, Table A, No. 10, [* 1017] the company may decline to register any transfer of shares made by a member who is indebted to them. When a call has been made between the time of the making of the executory contract of sale and the time appointed for making the transfer, it is the duty of the purchaser to clear the way for the registration of the transfer deed and the completion of the transfer by payment of the intervening call. (b) Where the articles of association of a joint-stock company provided that the directors might decline to register any transfer of shares made by a shareholder who was indebted to them, it was held that a shareholder could not be considered indebted to the company, in respect of a call made by the directors, until he had received a notice of the call, specifying the person to whom the call was to be paid, and the time and place of payment. (c) But a shareholder may be indebted to the company so as to be unable to transfer his shares, although he may have accepted a bill of exchange and handed it to the company by way of payment of the debt. (d) Under the 8 Vict. c. 16, sect. 16, the company is bound to register a transfer of shares on which no call can be made, as, for instance, fully paid-up shares, although the trans-

(z) *Rudge v. Bowman*, L. R. 3 Q. B. 689; 37 L. J. Q. B. 193.

(a) *Hall v. Norfolk Estuary Company*, 21 L. J. Q. B. 94.

(b) *Shaw v. Rowley*, 16 M. & W. 815.

(c) *Rudolph, Ex parte*, 32 L. J. Q. B. 369; 37 L. J. Q. B. 193.

(d) *Re London, Birmingham, &c. Bank*, 34 L. J. Ch. 418.

feror be the holder of other shares on which there are calls unpaid. (e) If the vendor of the shares has done all that the deed of settlement or the act of parliament under which the company is established requires him to do to entitle him to transfer his shares, it becomes the duty of the directors to enter a memorial of any transfer deed that may be duly executed by him in the register of transfers, and to do all that is necessary to be done to constitute the purchaser the holder of the shares in the place and stead of the vendor; and if they neglect or refuse so to do, they are responsible in damages to such purchaser. (f) But the directors must, of course, be furnished with all the materials necessary to enable them to make the registry. (g) By the 30 & 31 Vict. c. 131, sect. 26, the transfer must be registered on the application of the transferor, in the same manner and subject to the same conditions as if the application were made by the transferee. The same act provides for the issue of share-warrants to bearer transferable by delivery. The directors of a company have no discretionary power, independently of powers expressly given to them by the articles of association, [*1018] to refuse * to register a transfer which has been *bona fide* made. Therefore, where a transferee gave an address at which he was only an occasional visitor, it was held that the directors were bound to register the transfer, although the company was at the time in difficulties, and the shares were sold by the transferor in order to get rid of his responsibility. (h) But if, by the deed of settlement, the acceptance of the transferee is made dependent upon the approval of the directors, they need not give their reasons for refusing to approve; and in the absence of evidence to the contrary, the court will presume that they have acted reasonably and *bona fide*. (i)

Compulsory Registration by Mandamus. — Whenever a company, incorporated by royal charter or by act of parliament, has

(e) *Hubbersty v. The Manchester, Sheffield, & Lincolnshire Railway Company*, L. R. 2 Q. B. 59, 471; 36 L. J. Q. B. 198.

(f) *Catchpole v. Amberg, &c.*, 1 Ell. & Bl. 111.

(g) *Gregory v. East India Company*, 7 Q. B. 199.

(h) *Weston's case*, L. R. 4 Ch. 20; 38 L. J. Ch. 49, 673.

(i) *Re Gresham Life Ass. Soc., ex parte Penny*, L. R. 8 Ch. 446; 42 L. J. Ch. 133.

imposed upon it the duty of keeping a register and inserting therein the names of the proprietors or shareholders, the court will grant a mandamus to enforce performance of the duty; (*k*) so the court will compel them to register transfers or memorials of transfers of shares. (*l*) A company is not bound to register a transfer not in accordance with the statutable form. The ordinary form of transfer is by a deed simply informing the company who goes out as a shareholder, who comes in, and who is in future liable to calls; and if the transfer is encumbered with any trust, or is made by way of mortgage, or embraces other property, the company is not bound to receive and register the transfer. (*m*) The proper course, when shares in a company are made the subject of a settlement in trust, is for the settlor to execute the ordinary deed of transfer in the simple form given in the statute, transferring the shares for a nominal pecuniary consideration to the trustee, and to take at the same time a separate declaration of trust. The transfer deed is then left with the secretary, and the trustee is registered as absolute owner. (*n*) By sect. 30 of the Companies' Act, 1862, it is expressly enacted that no notice of any trust expressed, implied, or constructive, shall be entered on the register or be receivable by the registrar.

Rectification of the Register of the Shareholders in Registered Joint-Stock Companies. — By the 25 & 26 Vict. c. 89, sect. 35, it is enacted that, if the name of any person is without sufficient cause entered or omitted to be entered on the register of * shareholders, or if default is made or unnecessary [* 1019] delay (*o*) takes place in entering on the register the fact of any person having ceased to be a member of the company, such person, or any member of the company, or the company itself, may by motion in any of the superior courts of law or equity, or by application to a judge sitting at chambers, apply

(*k*) *Norris v. Irish Land Company*, 8 Ell. & Bl. 525; *Swan v. North British Aust. Co.*, 31 L. J. Ex. 425.

(*l*) *Reg. v. Lond. & Coleraine Ry. Co.*, 13 Q. B. 998; *Reg. v. Wing*, ib. 645; *Reg. v. Genl. Cem. Co.*, 6 Ell. & Bl. 415; *Reg. v. Mid. Ry. Co.*, 15 Ir. C. L. Rep. 525.

(*m*) *Reg. v. General Cemetery Company*, 6 Ell. & Bl. 415; 25 L. J. Q. B. 342.

(*n*) *Copeland v. North-Eastern Ry. Co.*, 6 Ell. & Bl. 277.

(*o*) *Shepherd's case*, L. R. 2 Ch. 16; 36 L. J. Ch. 32; *Lowe's case*, L. R. 9 Eq. 589; *Nation's case*, L. R. 3 Eq. 77.

for an order that the register may be rectified; and the court may, if satisfied, make the order. The court may decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in, or omitted from, the register, and may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register. (*p*). The courts will not exercise the powers given by this section, except in cases which are clear and free from complication. (*q*)

Most of the applications for the rectification of the registers under the above section take place on the winding up of a company, (*r*) and in deciding them the court will take into consideration who is the applicant, whether the official liquidator as the representative of the company, or the transferor of shares, the transfer of which was not registered before the commencement of the winding up. (*s*) The directors of a company have no discretionary power, independently of any power expressly given them by the articles of association, to refuse to register a transfer which has been *bona fide* made. Where, therefore, a transferee gave an address at which he was only an occasional visitor, it was held that the directors were bound to register the transfer, although the company was then in difficulties, the transferee a person of small means, and the shares were sold by the transferor in order to get rid of his liability. (*t*) Where, however, a discretion is given to the directors by the articles of association, a transferor cannot claim to have his name removed from the register under the above section, on the ground of unnecessary delay, unless the transferee be a responsible per-

(*p*) *Re Bank of Hindustan, &c.*, 34 L. J. Ch. 609; *Stewart's case*, L. R. 1 Ch. 574; 36 L. J. Ch. 738; *Ward's case*, L. R. 2 Ch. 431; 36 L. J. Ch. 462; *Kincaid's case*, L. R. 2 Ch. 412; 36 L. J. Ch. 499; *Ward & Garfit's case*, L. R. 4 Eq. 189; 36 L. J. Ch. 416; *Marino's case*, L. R. 2 Ch. 596; 36 L. J. Ch. 468; *Re National & Provincial Marine Insurance Company, ex parte Parker*, L. R. 2 Ch. 685.

(*q*) *Re Heaton Steel & Iron Co.*, Simpson's case, L. R. 9 Eq. Ca. 91.

(*r*) *Musgrave's case*, L. R. 5 Eq. Ca. 193; *Sahlgreen's case*, L. R. 3 Ch. App. 323; *Re Bank of Hindustan, China, & Japan, ex parte Kintrea*, L. R. 5 Ch. App. 95. As to such applications by an infant, see *Hart's case*, L. R. 6 Eq. Ca. 512; *Lumsden's case*, L. R. 4 Ch. App. 31.

(*s*) *Sichell's case*, L. R. 3 Ch. App. 119.

(*t*) *Weston's case*, L. R. 4 Ch. App. 20; *ib.* 6 Eq. Ca. 238.

son. (u) * And there is no duty, it seems, on the part [* 1020] of a company to communicate a refusal to register to the transferor. (x)

"We must not," says Kelly, C. B., "exceed the powers conferred upon us by this section." An application, therefore, by a person to have his name removed from the register has been refused, as not coming within the terms of the section, although it had been decided in an action by the company against him, that he was not liable to calls, on the ground that the company could not lawfully commence business without having passed a certain resolution, which they had not passed. (y)

A party may be precluded from availing himself of the jurisdiction of the court for the rectification of the register by his delay, (z) or by his having been originally placed upon the register by his own consent, (a) or if the error he seeks to rectify has been occasioned by his own misconduct and negligence (b) in executing stamped transfers in blank and handing such transfers with the certificates of his proprietorship to a third party, and thereby enabling the latter to commit frauds upon innocent purchasers. (c) But the negligence must be the immediate and proximate cause of the fraud. (d) Where an action for calls was pending between a company and an applicant for an order under this section, the court refused to make an order for the rectification of the register by removing one name and inserting another. (e)

In cases of fraud, forgery, or mistake, a company may be justified in removing the names of shareholders from their register; but when once a person has been put on the register, and has acquired the status of a proprietor, the company cannot take

(u) Shipman's case, L. R. 5 Eq. Ca. 219; and see Holden's case, L. R. 8 Eq. Ca. 444.

(x) Gustard's case, L. R. 8 Eq. Ca. 438; 38 L. J. Ch. 610.

(y) *Ex parte* Ward, 37 Law J. Exch. 83.

(z) Head's case, L. R. 3 Eq. 84; Taite's case, L. R. 3 Eq. 795; 36 L. J. Ch. 475; but see Baily's case, L. R. 5 Eq. 428; *ib.* 3 Ch. 592; 37 L. J. Ch. 670.

(a) Chapman & Barker's case, L. R. 3 Eq. 361.

(b) Ireland, Bank of, v. Trustees Evans' Charities, 5 H. L. C. 410.

(c) *Ex parte* Swan, 7 C. B. n. s. 400; 39 L. J. C. P. 113.

(d) Swan v. The North British Australian Company, *ante*, p. * 1015.

(e) Harris, *Ex parte*, 29 L. J. Ex. 364.

upon themselves to deprive the party of his status and strike him off the register by their own movement in the matter, and without any claim being put forward by some one having a better title. (*f*) If, therefore, the company put on their register a person having only an equitable title to certain shares, they cannot take his name off again, except at the instance of the party having the legal title; for it could never be permitted that a company, on discovering a flaw in a shareholder's title, should be at liberty to remove his name from the register, and [* 1021] treat his shares as nobody's, and *appropriate them and the dividends to their own use. The position of the company in respect of their registered shares is analogous to that of a bailee, who must be taken to hold for the person whose title he has recognized, until the shares are claimed by a party showing a better title. (*g*) But if a party has got himself placed on the register by means of forgery, misrepresentation, or fraud, and has no title at all, either legal or equitable, to the shares standing against his name, the company may remove his name from the register. (*h*) Where a husband without fraud applied for shares in the name of his wife and paid calls thereon, and she was registered as owner, and he afterward sold them, she not knowing anything of the matter, it was held that his estate was not liable, and the list could not be rectified. (*i*) Where a shareholder had his shares cancelled on his own request on one ground, which was not sufficient, but there existed at the time valid grounds, — viz., material misrepresentation, — it was held that the cancellation was good, although the valid grounds were unknown to the shareholder. (*k*)

The status of a subscriber must not be altered after the date of a winding-up order; (*l*) and where directors, after a stoppage but before the commencement of the winding up, *bona fide* and

(*f*) Martin, *Ex parte*, 2 H. & M. 669; Swan, *Ex parte*, 7 C. B. N. S. 400; 30 L. J. C. P. 113.

(*g*) Ward v. South-Eastern Ry. Co., 29 L. J. Q. B. 177.

(*h*) Cockburn, C. J., Ward v. South-Eastern Ry. Co., 29 L. J. Q. B. 182; Hare v. London & North-Western Ry. Co., 8 W. R. 352.

(*i*) *In re* London & Bombay Bank, 18 Ch. D. 581.

(*k*) Wright's case, L. R. 7 Ch. 55.

(*l*) Oakes v. Turquand, L. R. 2 H. L. 325. But if he has filed his bill before the order, that is sufficient. See Reese River Mining Co. v. Smith, L. R. 4 H. L. 64; Pawle's case, L. R. 4 Ch. 497.

reasonably refused to record future transfers, they were held not to be in default within the meaning of 25 & 26 Vict. c. 89, sect. 35, *supra.* (m) Where a shareholder took shares upon a fraudulent representation, he could not rescind his contract after winding up, even if the company could pay its liabilities in full. (n)

Public companies have been termed the parliamentary book-keepers of the fund intrusted to their management; and it is a duty they owe to all persons interested in the fund, so to keep the account as that it may distinctly appear at all times what transfers and assignments have been made; and if a stockholder can show that on a given day stock stood in his name, and that it does not now stand in his name, and that he has not authorized the transfer of it, he may require the company to replace the stock. (o)

Registration of Forged Transfers.¹ — If a transfer of shares has been forged, and the forged transfer entered in the company's * books, and the name of the shareholder [* 1022] expunged from the registry on the strength of the forged document, the shareholder does not thereby lose one iota of his rights against the company; he can compel them to restore his name, and may enforce payment of the dividends due to him, whether his name has been restored or not. And if both the shareholder and the party claiming under the forged transfer bring actions against the company for the recovery of the dividends declared on the shares, the court will not compel them to interplead to establish their rights. If the company have registered a forged transfer, they are answerable to a purchaser under the forged transfer for the value of the shares. (p) Where

¹ *Telegraph Co. v. Davenport*, 97 U. S. 369; *Simm v. Anglo-Am. Tel. Co.*, 20 Am. L. Reg. n. s. 159, and note by E. H. Bennett, ib. 168; *Lowry v. Commercial &c. Bank*, Taney, 310; *Sewall v. Boston Water-Power Co.*, 4 Allen, 277; *Pratt v. Taunton Copper Co.*, 123 Mass. 110; *Chew v. Bank of Baltimore*, 14 Md. 299; *Pollock v. National Bank*, 7 N. Y. 274; *Weaver v. Barden*, 49 N. Y. 286; *Cohen v. Gwynn*, 4 Md. Ch. 357.

(m) *Mitchell's case*, L. R. 4 Ap. Cas. 567; *Rutherford's case*, ib. p. 581.

(n) *Burgess's case*, 15 Ch. D. 507.

(o) *Sloman v. Bank of England*, 14 Sim. 486.

(p) *Dalton v. Midland Ry. Co.*, 12 C. B. 458; 13 C. B. 474; *Hildyard v. South Sea Co.*, 2 P. Wms. 75; *In re Bahia & San Francisco Ry. Co.*, L. R. 3 Q. B. 584; 37 L. J. Q. B. 176; *Hart v.*

trust-money was invested in railway debentures, made payable to three trustees, and the debentures were left in the hands of one of the trustees, who received the interest upon them, and subsequently sold the debentures to a *bona fide* purchaser, and forged the names of his co-trustees to a transfer of the debentures, and the purchaser presented the debentures at the transfer office of the railway company, and got them transferred into his own name, it was held that the transfer was null and void, and that the trustees were still entitled to the debentures; and the Court of Chancery ordered them to be delivered up to the trustees, and directed the transfer and entry thereof in the company's books to be cancelled. "No laches," it was observed, "could be imputed to the trustees for suffering one of their number to hold the debentures; for some of them must hold them, unless they are deposited with bankers, or placed in a box secured by a number of different locks, of which each trustee shall hold one of the keys; and negligence cannot be imputed to trustees for not taking such precautions as these." (q)

Where stock in a railway company stood in the names of two proprietors, and the one sold the stock and signed a transfer of the shares, and forged the signature of his co-proprietor, and the company registered the forged transfer and paid the purchaser the dividends, and the forgery was not discovered for many years, it was held that the company was nevertheless bound to replace the stock. (r) If the forgery has been occasioned by the plaintiff's gross negligence and misconduct, amounting to an estoppel or a ratification, (s) or if he has acted so as to [* 1023] be *particeps criminis*, * he will be precluded from setting up or relying upon the forgery; (t) but the negligence or misconduct must be the proximate cause of the forgery, and the direct means of effecting it. (u)

Frontino & Bolivia, &c. Co., L. R. 5 Ex. 111; 39 L. J. Ex. 93; *Johnston v. Renton*, L. R. 9 Eq. 181; see *Sim v. Anglo-American Tel. Co.*, 5 Q. B. D. 188.

(q) *Cottam v. Eastern Counties Ry. Co.*, 1 John. & H. 247; 30 L. J. Ch. 217.

(r) *Taylor v. Midland Ry. Co.*, 28 Beav. 287; 29 L. J. Ch. 733; *Sloman v. Bank of England*, 14 Sim. 475.

(s) *Ireland, Bank of, v. Evans's Charities*, 5 H. L. C. 413; see *In re Cooper*, 20 Ch. D. 611.

(t) *Swan, Ex parte*, 7 C. B. N. S. 434; 30 L. J. C. P. 113.

(u) *Swan v. North British Australian Co.*, ante, p. *1015.

Transfers of Stock in the Public Funds are regulated by the 33 & 34 Vict. c. 71, which also provides for the issue of stock certificates transferable by delivery. Persons to whom transfers of stock are made in the books of the Bank of England are required to underwrite their acceptance of the transfer; but their neglect so to do does not enable the transferor to treat the transfer as a nullity. (*x*)

Specific Performance of Contracts for the Purchase and Sale of Stock and Shares.¹ — The court will not decree specific performance of a contract for the sale of stock in the public funds generally, as one portion of stock is as good as another, and it must be the same thing to the purchaser, whether he receives the stock agreed to be sold to him, or the money that will purchase it in the market. The purchaser, therefore, is left to his remedy by way of action for damages. (*y*) But if the contract is for certain specific stock or shares in a particular railway company or joint-stock company, the court will decree a specific performance as against the vendor, provided the rights of third parties have not in the mean time intervened. (*z*) A sale of an annuity payable out of the dividends of particular stock has been enforced in specie. (*a*) There is no analogy, it has been observed, between a contract for the purchase and sale of a quantity of three per cent. consols, or any other stock generally, which is always to be had by any person who chooses to apply for it in the market, and where the vendor fulfils his contract by tendering any stock of the description bargained for, and a contract for certain specific numbered railway shares, mining shares, or scrip. (*b*) Where certain numbered railway shares were sold by auction, and the purchaser paid his purchase-money, but did not take a transfer of the shares, and then sold to a third party who refused to register himself as owner of the shares, and calls were

¹ See article, 16 Am. L. Rev. 606; also *post*, p. * 1120.

(*x*) *Foster v. Bank of England*, 8 Q. B. 705. As to the ordinary mode of transferring stock, see *Keyser's Law of the Stock Exchange*.

(*y*) *Cud v. Rutter*, 20 Vin. Abr. tit. *Stocks*, pl. 9; 1 P. Wms. 570.

(*z*) *Doloret v. Rothschild*, 1 Sim. & Stu. 598.

(*a*) *Withy v. Cottle*, ib. 174; 1 Turn. & Russ. 78.

(*b*) *Duncuft v. Albrecht*, 12 Sim. 199.

made on the shares which were left unpaid, it was held that the original vendor was entitled to a decree for specific performance against the original purchaser. (c) The court will not enforce performance of a contract for the purchase of scrip [* 1024] * certificates in projected companies, and will not, when the company has been completely registered or incorporated, compel the purchaser to take a transfer of the corresponding shares from his vendor, or to indemnify the latter from calls subsequently made. (d) Nor will specific performance be decreed where the directors, under the powers conferred by the deed of association, refuse to assent to the transfer. (e) If a party has signed an application for shares in a registered joint-stock company, and shares have been allotted to him in consequence of his application, the Court of Chancery will compel him to sign the written acceptance of the transfer, and pay the calls due on the shares. (f)

(c) *Shaw v. Fisher*, 12 Jur. Chan. 152; *Paine v. Hutchinson*, L. R. 3 Eq. C. 2.

257; *ib.* 3 Ch. 388; 36 L. J. Ch. 169; 37 *ib.* 485.

(d) *Jackson v. Cocker*, 4 Beav. 59;

Columbine v. Chichester, 2 Phil. Ch. C. 2.

(e) *Birmingham v. Sheridan*, 33 Beav. 660.

(f) *New Brunswick, &c. Co. v. Mugeridge*, 1 Drew. 686.

BOOK III.

[* 1025]

IMPLIED CONTRACTS.¹⁰²

CHAPTER I.

GENERAL PRINCIPLES.

Implied Contracts.¹ — We have already seen (a) that the law implies from men's conduct and actions contracts and promises.

¹ Consult 1 Story, Contr. (5th ed.) sects. 11-21 ; 2 Pars. Contr. 515 ; 1 ib. 556 ; U. S. Dig. tit. *Contracts*, 470 ; ib. tit. *Damages*, 203 ; ib. tit. *Services*, 1.

An express contract is one where the terms of the agreement are declared by the parties at the time it is entered into ; an implied contract is one arising under circumstances which, in the ordinary course of dealing and the common understanding of men, shows a mutual intention to contract ; a constructive contract is a fiction of the law for the purpose of enforcing legal duties by actions of contract, where no proper contract exists, express or implied. *Hertzog v. Hertzog*, 29 Pa. St. 465 ; and see Abb. L. Dict. *Express* ; *ImPLY*.

A contract may be implied from circumstances (*Dayton v. Ryerson*, 13 How. Pr 281) ; and an implied promise does not differ from an express promise, except in the evidence by which it is proved (*Chilcott v. Trimble*, 13 Barb. 502).

But the law will not imply a contract when an express one is proved ; though if no special contract is proved, there may be a recovery on the implied contract for whatever is done and accepted (*Draper v. Randolph*, 4 Harr. (Del.) 454 ; and see *Storm v. United States*, 94 U. S. 83 ; *Whiting v. Sullivan*, 7 Mass. 107 ; *Mass. General Hospital v. Fairbanks*, 129 Mass. 78) ; nor will it raise an implied contract, conferring authority to do an act, where there existed no legal right to make an express contract authorizing such an act (*Simpson v. Bowden*, 33 Me. 549) ; nor will it imply a promise to pay for an act which is of no benefit to the party, and performed without his request, express or implied (*Medlin v. Brooks*, 7 Mo. 106) ; nor will it imply an engagement contrary to what is expressed (*Van Ness v. Washington*, 4 Pet. 232 ; *Gavinzel v. Crump*, 22 Wall. 308 ; *Brown v. Spofford*, 95 U. S. 474) ; nor will it imply one against the express declaration of a person on whom no duty is imposed by law (*Earle v. Coburn*, 130 Mass. 596) ; nor from mere usage (*Tilley v. Cook*, 103 U. S. 105).

What is the implied contract between master and owners of vessel, and a seaman, where shipping articles are not executed, see *Worth v. The Lioness*, 3 Fed. Reporter, 922 ; *Longstreet v. Springer*, 4 Fed. Reporter, 671 ; *The Hudson*, 8 Fed. Reporter, 167.

(a) *Ante*, p. * 22.

¹⁰² See Appendix, Vol. III.

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as forcible and binding as those made by express words, and that such contracts are implied sometimes in furtherance of the intention, or presumed intention, of the parties, and sometimes in furtherance of justice, without regard to the intention of the parties. Thus a promise to pay for services rendered or for goods received or money obtained, will be implied against a wrong-doer who never intended to pay, or intended deceptively to avoid payment. (b) Although a contract may appear on the face of it to bind and be obligatory only upon one party, yet there are occasions on which the law will imply corresponding and correlative obligations on the part of the other party in whose favor alone the contract may appear to be drawn up. Where the act to be done by the party binding himself can only be done upon something of a corresponding character being done by the opposite party, the law will there imply a corresponding obligation to do the things necessary for the completion of the contract. Thus if A covenants or engages by contract to buy an estate of B at a given price, although that contract may be silent as to any obligation on the part of B to sell, yet as A cannot buy without B selling, the law will imply a corresponding obligation on the part of B to sell. (c) So if a man agrees to work and render services which necessitate great outlay of money, time, and trouble, and he is only to be paid by [* 1026] the measure of the work he has performed, the * contract necessarily pre-supposes and implies on the part of the person who engages him an obligation to supply the work. So where there is an engagement to manufacture some article, a corresponding obligation on the other party is implied to take it, for otherwise it would be impossible that the party bestowing his services could claim any remuneration. (d)

Of Implied Covenants.¹ — Although the words of a contract under seal do not in themselves import any express covenant, yet the law, in order to promote good faith and make men act

¹ See Rawle, *Covenants for Title*, c. 12; U. S. Dig. tit. *Covenants*, sect. 58.

(b) *Foster v. Stewart*, 3 M. & S. 191; (c) *Pordage v. Cole*, 1 Wms. Saund. Lightly v. Clouston, 1 Taunt. 113; Erle, 319 l. C. J., *Rumsey v. N. E. Ry. Co.*, 32 L. J. (d) *Churchward v. Reg.*, L. R. 1 C. P. 247; *Clark v. Gilbert*, 2 Sc. 534. Q. B. 195.

up to the spirit as well as to the letter of their engagements, will create and supply, as a necessary result and consequence of the contract, certain covenants and obligations, which bind the parties as forcibly and effectually as if they had been expressed in the strongest and most explicit terms in the deed itself. Thus where it was agreed by deed between A and B that B should pay a sum of money for A's lands by a particular day, it was held that there was, by implication, a covenant to execute a conveyance of the land by the day named. (e) And where, on the sale and transfer of the goodwill of a business, it was stipulated that the transferee should pay to the transferor one-fourth part of the earnings of the business for four successive years, it was held that the law would imply a covenant from the transferee to continue the business for four years, and endeavor to make it productive, if there was reasonable prospect of success. (f) By the common law, if one man granted to another any estate or interest or incorporeal right, the law implied a covenant from the grantor that he would do nothing to annul or avoid such grant; if he granted a watercourse, a right of way, or estovers, there resulted from such grant, by inference of law, a covenant for the quiet enjoyment of the thing granted, and if the grantor stopped up the watercourse or the road, or cut down the wood out of which the estovers were to be taken, the grantee was entitled to an action of covenant against him for the misfeasance. (g) By the 7 & 8 Vict. c. 76, sect. 6, however, which extends to all estates, rights, and interests created between the 1st of January and the 1st of October, 1845, it is enacted that the word "grant" in a deed shall not have the effect of creating any covenant by implication, except in cases where, by any act of parliament, it is or shall be declared that the word "grant" shall have such effect. And by the 8 & 9 Vict. c. 106, sect. 4, it is enacted that the word "give" or the word "grant" in a deed executed after the 1st of October, 1845, shall
* not imply any covenant in law in respect of any [*1027] tenements or hereditaments, except so far as the word

(e) *Fordage v. Cole*, 1 Saund. 319.(g) 1 Saund. 321; *Bac. Abr. Cove-*(f) *McIntyre v. Belcher*, 14 C. B. *nant* (B).

x. s. 654; 32 L. J. C. P. 254.

"give" or the word "grant" may, by force of any act of parliament, imply a covenant.

By the Conveyancing and Law of Property Act, 1881, (*h*) sect. 49, the use of the word "grant" is declared to be unnecessary in order to convey tenements or hereditaments, corporeal or incorporeal; and by sect. 7, various covenants, such as "right to convey," "quiet enjoyment," "freedom from incumbrance," "further assurance," "validity of lease," are to be implied in conveyances, mortgages, &c., by persons who convey, and are expressed to convey, as beneficial owners or as trustee, mortgagee, &c.

It was formerly held, in the case of leases under seal, that the law would imply from the word "demise," or any equivalent words in the contract constituting and creating the lease, a covenant on the part of the lessor that he had a right to make the lease; (*i*) but it has been determined that there is no implied covenant on the part of the lessor that he has "good title to demise," but only a covenant that he will put the lessee into possession of the thing demised, (*k*) and that the lessee "shall quietly enjoy" during the term, (*l*) or in the case of a tenancy from year to year, during the continuance of the lessor's interest. (*m*) From the words "yielding," or "paying," or any equivalent words amounting to a reservation of rent, there is an implied covenant on the part of the lessee to pay the rent so reserved, although the words do not in themselves import any express covenant. In all assignments of leases and existing interests, there is an implied covenant on the part of the assignor that he has himself done nothing, and will do nothing, to prejudice or defeat the estate, title, or interest that he professes to assign. Where the proprietor of a medicine and a recipe for making the same assigned the medicine and recipe, and all his "right, title, interest, claim, or demand to the same medicine,

(*h*) 44 & 45 Vict. c. 41, sect. 49.

(*i*) *Holder v. Taylor*, Hob. 12; *Shep. Touch.* 165, 167; *Noke's case*, 4 Co. Rep. 80 b; 9 Ves. 330; *Line v. Stephenson*, 7 Sc. 69.

(*k*) *Coe v. Clay*, 5 Bing. 440; 3 Moo.

& P. 57; *Messent v. Reynolds*, 8 C. B. 201.

(*l*) *Bandy v. Cartwright*, 8 Exch. 913; *Giles v. Hooper*, Carth. 135; *Williams v. Burrell*, 1 C. B. 428.

(*m*) *Penfold v. Abbott*, 32 L. J. Q. B. 67.

&c.," to a purchaser, it was held that the law would imply from the transfer and assignment a covenant from the vendor that he would not himself prepare and vend the medicine so assigned, or engage with others so doing. (*n*) And where a man by deed "bargained, sold, assigned, and transferred" a sum of money due to him from a third person, it was held that the law would imply, from the words of transfer and assignment, a covenant from the * assignor to do no act to prevent the [* 1028] assignee from obtaining possession of the sum so assigned. (*o*) It has been said, however, that it does not follow "that because parties have expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for every act convenient, or even necessary, for the perfect performance of their express covenants." (*p*)

The liability of a shareholder of a joint-stock company registered under the Act of 1862, to contribute to the assets of the company, is in the nature of a specialty debt, (*q*) and the case is the same where the company is not registered under that act, but is wound up under it. (*r*)

Implied Promises. — An agreement for a lease to commence from a particular day does not amount to an agreement to give the intended lessee possession on that day; (*s*) but, as we have seen, if there be a lease or present demise, there is an implied promise or covenant from the lessor to put the lessee into possession of the thing demised, and to secure him the free use, possession, and enjoyment of it for the term for which he has agreed to let it, as against all persons claiming through the lessor or by title paramount. (*t*) If apartments in the interior of a house are demised by parol, the law implies a promise from the lessor to allow the tenant the use of the door-bell and knocker, the benefit of the skylight on the staircase, the use of the water-

(*n*) *Seddon v. Senate*, 13 East, 63.

(*o*) *Deering v. Farrington*, 3 Keb. 304; *Freem*. 368; 1 Mod. 113.

(*p*) *Aspdin v. Austin*, 5 Q. B. 683, 684; but see *Emmens v. Elderton*, 4 H. L. Cas. 624, 647, 656; 13 C. B. 495; and *Whittle v. Frankland*, 2 B. & S. 49; 31 L. J. M. C. 81.

(*q*) Companies' Act of 1862, sect. 75;

Buck v. Robson, L. R. 10 Eq. 629; 39 L. J. Ch. 821.

(*r*) *In re Muggeridge*, L. R. 10 Eq. 443; 39 L. J. Ch. 620.

(*s*) *Drury v. Macnamara*, 25 L. J. Q. B. 5.

(*t*) *Ante*, p. * 222.

closet, and the enjoyment of all such rights as are naturally incident to the subject-matter of the contract, and necessary for the reasonable and comfortable enjoyment of it. (*u*) In the case of an executory agreement for the sale and purchase of a lease, the law implies a promise from the vendor to establish and make good his title to the lease which he proposes to sell and assign. (*x*) And when the purchaser has accepted the assignment, the law implies a promise from him to the assignor to pay the rent reserved in such lease, and perform the covenants therein contained. (*y*)

The law also implies from all persons who undertake any duty, charge, office, employment, or trust, a promise to act with integrity and diligence, and proper and reasonable care in the execution of such duty, trust, or employment, and according to [* 1029] orders * given and assented to. (*z*) A banker who has in his hands sufficient funds of a customer, impliedly undertakes to pay a cheque drawn by the latter, if the cheque be presented within banking hours; (*a*) and a man who undertakes the duty and office of an executor, and has assets sufficient for the purpose, impliedly promises to pay for a funeral suitable to the station in life of his testator, furnished and provided by a third person in the absence of the executor, and without his knowledge and concurrence; and the law implies a request from the executor to the stranger who has undertaken the necessary duty to do what he has done, although in point of fact he gave no orders and made no promise. (*b*) If a man voluntarily takes charge of the goods and chattels of another, the law implies a promise from him to take reasonable and proper care of them. (*c*) The law also implies a promise from a common innkeeper to secure his guest's goods in his inn, and to take all reasonable and proper care of horses and cattle placed in his stables; (*d*) from a common carrier

(*u*) *Underwood v. Burrows*, 7 C. & P. 29.

(*x*) *Souter v. Drake*, 5 B. & Ad. 992; 3 N. & M. 40; *Hall v. Betty*, 5 Sc. N. R. 508.

(*y*) *Burnett v. Lynch*, 8 D. & R. 376, 383; 5 B. & C. 602.

(*z*) *Morgan v. Ravey*, 6 H. & N. 265; 30 L. J. Ex. 131.

(*a*) *Marzetti v. Williams*, 1 B. & Ad. 415.

(*b*) *Rogers v. Price*, 3 Y. & J. 28; *Tugwell v. Heyman*, 3 Campb. 298.

(*c*) *Southcote's case*, 4 Rep. 83 b, 84.

(*d*) *Ante*, p. * 298.

or cab-proprietor, to be answerable for the goods he carries; (e) from a ferryman, safely to transport things intrusted to him across a river, and deliver them on the opposite bank; from a common farrier, that he will shoe a horse without laming him; from a trainer of horses, that he will exercise reasonable skill and management in the riding of horses intrusted to him; from any artificer and handicraftsman, that he will exercise his art rightfully, truly, and skilfully, as he ought; and from brokers, agents, solicitors, surgeons, and other professional men, that they will severally, in their respective callings, exercise competent skill and proper care in the service they undertake to perform, in which, if they fail, an action lies to recover damages for the breach of their implied promise. (f)

When one man engages with another to supply him with a particular thing, to be applied to a certain use, in consideration of a pecuniary payment, he enters into an implied contract that the thing shall be reasonably fit for the purpose for which it is to be used, and shall not contain any defect unfitting it for such purpose which might have been discovered by the exercise of reasonable skill and diligence, or by ordinary inquiry and examination. (g)

* If a husband wrongfully discards his wife, any person may furnish her with raiment, food, lodging, and the necessaries of life; and the law will imply a promise from the husband to pay for the things so supplied, in the same way as if they had been supplied to himself at his express request. (h) As a man is bound to support his wife whilst living as being part and parcel of himself, so is he bound by law to bury her when dead; and if the husband has abandoned the wife and lives in a distant land, and is unable, or, being able, is unwilling, and neglects to bury her, any stranger may undertake the duty,

(e) *Ante*, p. * 531.

(f) *Ante*, p. * 404, *et seq.*; *Norris v. Staps*, Hob. 211; 1 Roll. Abr. 91, pl. 15; *Best v. Yates*, 1 Vent. 268.

(g) See as to a building to view a public exhibition, *Francis v. Cockrell*, L. R. 5 Q. B. 501; 39 L. J. Q. B. 291; a railway carriage, *Redhead v. Midland*

Ry. Co., L. R. 2 Q. B. 412; *ib.* 4 Q. B. 379; 38 L. J. Q. B. 169; as to a bridge, *Grote v. Chester & Holyhead Ry. Co.*, 2 Ex. 251; as to a staircase in a public exhibition, *Brazier v. Polytechnic Institution*, 1 F. & F. 507.

(h) *Ante*, p. * 142.

and defray the expenses of a funeral suitable to her rank or fortune; and the law implies a request on the part of the husband to the stranger so to do, as well as a promise to repay the money so laid out, upon which implied promise an action is maintainable against the husband, though the burial was, in point of fact, undertaken, and the money paid, without his knowledge or consent. (2) So that in this, as in other instances of implied contracts and promises, the ancient legal maxim is well supported, — *in fictione juris subsistit æquitas*.

When a servant binds himself to work for some certain period, and the master agrees to pay wages in proportion to the work done, there is an implied obligation on the part of the master to provide work. And if a person contracts to pay a salary for services to be rendered for a certain term, there is an implied contract on his part to permit those services to be performed. (k) Generally speaking, every workman who devotes his labor, his talents, and his time to the service of an employer is entitled to a recompense; and the law implies a promise from the employer, in case nothing has been said or stipulated concerning payment, to pay a reasonable compensation for the services rendered; and the right of action upon such implied promise or undertaking arises as soon as the work has been completed, and the employer is enabled to avail himself of the benefit of it. (l) But the law raises no implied promise in respect of services rendered against the will of the recipient, (m) or in respect of mere gratuitous services, — such as voluntary assistance in saving property from fire, or securing property found afloat, or beasts found astray, or voluntary and unsolicited supplies of food and lodging, or voluntary services in the management of the affairs of another; for that which is offered and accepted as a gratuity cannot afterward be converted into a debt. (n) The law raises no implied

(i) *Jenkins v. Tucker*, 1 H. Bl. 94; *British Empire Shipping Co. v. Somerset*, 13 M. & W. 259; E. B. & E. 353; 30 L. J. Q. B. 229.

Bradshaw v. Beard, 12 C. B. x. s. 344; 31 L. J. C. P. 273. (n) *Nicholson v. Chapman*, 2 H. Bl. 354; 1 Esp. 86; *Peake's Ad. C.* 226; 1

(k) *Reg. v. Welch*, 2 Ell. & Bl. 357; C. & P. 434; *Taylor v. Brewer*, 1 M. & Emmens v. Elderton, 4 H. L. Cas. 624. S. 290; *Roberts v. Smith*, 4 H. & N.

(l) *Hughes v. Lenny*, 5 M. & W. 183. 315; 28 L. J. Ex. 164.

(m) *Stokes v. Lewis*, 1 T. R. 20;

* promise of remuneration in favor of a person who [* 1031] professes to render services of a purely honorary character. (o) Where a duty is imposed by statute upon a public officer, and no provision is made for the payment of any remuneration, an action is not maintainable upon the statute for the recovery of any remuneration. (p)

Whether any contract is made, or on what terms it is made, must depend on the circumstances of each case and upon custom and usage. (q) If a fund is to be collected, and a party merely speculates on the chance of being paid, taking the risk whether funds will be collected and appropriated to his demand, there is no contract. If he does work on the order of another under such circumstances that it must be presumed that he looks to be paid as a matter of right by him, then a contract would be implied with that person. (r) If a man wrongfully decoys away my servant or apprentice against my will, and acquires and makes use of his labor and services, the law will imply a promise from the wrong-doer to render me a fair equivalent in respect thereof. (s) So if a man takes luggage by an excursion train, knowing that the company do not carry luggage gratuitously for persons travelling by such train, a contract to pay for its carriage may be implied. (t)

Part Execution of a Special Contract.—Where a workman had been induced to enter into a special contract to remove a quantity of rubbish by a fraudulent representation made by the employer, it was held that he might repudiate the contract as soon as he discovered the fraud, and sue his employer for compensation for his lost time and labor; (u) and when a special contract for work and services has been abandoned and put an end to, and the employer has derived some benefit from work done under it, he may be made liable, upon an implied promise, to make a reasonable remuneration in respect thereof. (x)

(o) *Ante*, p. * 388.

(p) *Jones v. Carmarthen (Mayor of)*, 14 C. B. N. S. 641; 32 L. J. C. P. 244. 8 M. & W. 605.

(q) *Rigley v. Dakin*, 2 Y. & J. 87.

(r) *Higgins v. Hopkins*, 3 Exch. 166. *Hopkins v. Richardson*, 14 L. J. Q. B.

(s) *Lightly v. Clouston*, 1 Taunt. 80; *Inchbald v. Western Neilgherry Tea Co.*, 17 C. B. N. S. 733; 34 L. J. C. P. 112; *Foster v. Stewart*, 3 M. & S. 195.

(t) *Rumsey v. North-Eastern Ry. Co.*,

14 C. B. N. S. 641; 32 L. J. C. P. 244.

(u) *Selway v. Fogg*, 5 M. & W. 86.

(x) *Burn v. Miller*, 4 Taunt. 745;

Hopkins v. Richardson, 14 L. J. Q. B.

80; *Inchbald v. Western Neilgherry Tea*

Co., 17 C. B. N. S. 733; 34 L. J. C. P.

Implied Contracts for Sale.¹ — Whenever a purchaser retains goods after a special contract for the sale of them has gone off, or has not been exactly performed by the vendor, the vendor may recover the value of the goods upon a new contract and promise which the law then implies from the retention [* 1032] of the goods. (y) * If goods have been obtained by fraud and deceit, the party defrauded of his goods may, if he thinks fit, waive the tort, and sue upon an implied contract, treating the wrong-doer as a purchaser of the goods. Where a father falsely pretended to retire from business in favor of an infant son whom he introduced as his successor, stating that he should keep a watchful eye over him, and upon this representation the plaintiffs supplied the son with goods to the amount of £800, and the son refusing to pay for these goods, and being exonerated from liability by reason of his minority, the plaintiffs brought their action against the father, it was held that, if the father's statement to the plaintiffs was false, and he continued, notwithstanding his pretended retirement, to have a secret interest in the concern, he was liable upon an implied promise to pay to the plaintiffs the price of the goods as the real buyer and principal in the transaction. (z) And where the defendant knowingly induced the plaintiff to sell goods to an insolvent, which goods were immediately afterward made over to the defendant himself, the court held that the law would imply a contract from the defendant to pay for the goods as the real purchaser, the insolvent appearing to have been the mere creature and agent of the defendant, and a mere man of straw in the transaction, made use of by the defendant to enable him to perpetrate a fraud upon the plaintiff. (a)

Implied Contracts of Indemnity. — When an act has been done by A under the express directions of B, which occasions an injury to the rights of third persons, yet if such an act is

¹ See 2 Story, Contr. sect. 1330; 2 Pars. Contr. 520, 658; U. S. Dig. tit. *Contracts*, sect. 1660; Langdell, Cas. on Contr. Part II. sect. 6.

15; *Bartholomew v. Markwick*, 15 C. B. N. S. 711; 33 L. J. C. P. 145.

(y) *Oxendale v. Wetherell*, 9 B. & C. 388; *Mavor v. Pyne*, 11 Moore, 2.

(z) *Biddle v. Levy*, 1 Stark. 20.

(a) *Hill v. Perrott*, 3 Taunt. 274;

Abbotts v. Barry, 2 B. & B. 369; 5 Moore, 98.

not apparently illegal in itself, but is done honestly and *bona fide* in compliance with B's directions, he is bound to indemnify A against the consequences. (b) Thus where the plaintiff, an auctioneer, had sold cattle at the direction of the defendant, which, as it afterward turned out, belonged to another person, who made the auctioneer responsible, it was held that the plaintiff was entitled to be indemnified by the defendant. (c) So where the plaintiff, a sheriff who had received from the defendant a *fi. fa.* for execution, executed it on cattle which the defendant pointed out to him as being the debtor's, it was held that an indemnity might be implied. (d) Where, again, the plaintiff, at the request of the defendant, had delivered to him certain goods which belonged to a third party, it was held that a promise to indemnify might be implied. (e)

* **Foreign Judgments.**—The law raises an implied [* 1033] contract to pay a sum of money adjudged to be due from one man to another by the sentence of a foreign or colonial court, (f) provided the judgment is final, and a fixed and ascertained sum of money is thereby adjudged to be paid. (g) But the pendency of an appeal is no bar to the action, although it may afford ground for an application to stay proceedings. (h) Nor is it any answer to such an action that the judgment is erroneous on the merits or founded on a mistaken notion of English law; (i) but it may be defeated by showing that the court had no jurisdiction, (k)—as, for instance, that the judgment was pronounced against a person behind his back, who was not subject to its jurisdiction, (l) or that the judgment was obtained

(b) *Toplis v. Grane*, 5 Bing. N. C. 636.

(c) *Adams v. Jarvis*, 4 Bing. 66.

(d) *Humphreys v. Pratt*, 5 Bli. n. s. 154.

(e) *Betts v. Gibbins*, 2 Ad. & E. 57; *Dugdale v. Lovering*, L. R. 10 C. P. 196.

(f) *Parke, B.*, *Williams v. Jones*, 13 M. & W. 633; *Philpott v. Adams*, 7 H. & N. 888; 31 L. J. Ex. 421.

(g) *Sadler v. Robins*, 1 Campb. 253.

(h) *Scott v. Pilkington*, 2 B. & S. 11; 31 L. J. Q. B. 81.

(i) *De Cosse Brissac v. Rathbone*, 6 H. & N. 301; 30 L. J. Ex. 238; *Castrigue v. Imrie*, L. R. 4 H. L. 414; 39 L. J. C. P. 350; *Godard v. Gray*, L. R. 6 Q. B. 139; 40 L. J. Q. B. 62.

(k) *Vanquelin v. Bonard*, 33 L. J. C. P. 78.

(l) *Buchanan v. Rucker*, 9 East, 192; *Schibsby v. Westenholz*, L. R. 6 Q. B. 155; 40 L. J. Q. B. 73; see however *Copin v. Adamson*, 1 Ex. D. 17; *Rousillon v. Rousillon*, 14 Ch. D. 351.

by fraud, (*m*) or perhaps that it was given against good faith and natural justice. (*n*)

Statutes. — Where a statute gives a right to a sum of money and provides no means of recovering it, the law raises an implied contract to pay it, and an action may be maintained for the amount. (*o*)

SECTION I.

OF IMPLIED PROMISES IN RESPECT OF MONEY PAID FOR ANOTHER.

Of the Implied Promise in Respect of Money paid for Another.¹

— Whenever one man has expended and laid out money for the use of another by his authority or at his request, the law implies, from the person on whose account and for whose use the money has been expended, a promise of repayment, in the absence of circumstances showing that the money was advanced as a gift. (*p*) Where the defendant asked the plaintiff to accompany him to a harness-maker, to assist him in procuring some [* 1034] harness, and the * plaintiff, in the defendant's presence, assured the harness-maker that, if the defendant did not pay, he, the plaintiff, would, and the defendant made default, and the plaintiff paid the money, it was held that the law would imply a promise from the defendant to repay the money, as being "money paid by the plaintiff for the use of the defendant at his request." (*q*) If a person who owes a debt to A, by any contrivance causes B to pay it, an action will lie to recover back the amount, and the machinery by which the mischief was

¹ 4 Wait, Act. & D. c. 97, p. 449; U. S. Dig. tit. *Money Paid*.

(*m*) *Bowles v. Orr*, 1 Y. & C. Ex. 464; *Bank of Australasia v. Nias*, 16 Q. B. 717. (*o*) *Richardson v. Willis*, L. R. 8 Ex. 69; 42 L. J. Ex. 68.

(*p*) *Brittain v. Lloyd*, 14 M. & W.

(*n*) *Simpson v. Fogo*, 1 H. & M. 195; 762; 15 L. J. Ex. 43; *Barber v. Butcher*, 32 L. J. Ch. 249; 2 Smith, L. C. 6th ed. 15 L. J. Q. B. 289; 8 Q. B. 863.

(*q*) *Alexander v. Vane*, 1 M. & W. 511.

brought about is utterly immaterial. Therefore, where one of two partners made a note in the partnership name, and paid it away in discharge of his own private debt, and the co-partner was compelled to pay the amount of the note, it was held that he was entitled to recover the money from his colleague, the maker of the note, as money paid at his request. (r) When several persons together consent to share a common responsibility, there is, in the absence of an express agreement to the contrary, an understood authority from all to any one and to each of them to discharge the common burthen and liability; and if any one of them pays the whole amount, or more than his own share and proportion, the money paid by him over and above his own proportion is money paid for the use of the others at their request. (s) And the same rule prevails with regard to all joint contractors, not being partners, who have undertaken or have been made subject to a joint liability, and one of whom has paid the whole or more than his own share and proportion of the common burthen, and has thus relieved his co-contractors from their liability, either wholly or in part. (t) If a party of friends, for example, meet to dine at a tavern, and give a joint order for dinner, and after dinner all but the plaintiff depart without paying, and the plaintiff pays for all, he may maintain an action against the others upon an implied promise to pay their several proportions of the joint liability; (u) and the same rule prevails, and the same implied promise arises, where four persons jointly retain a solicitor to defend them against a civil or a criminal charge, or to conduct an action or a prosecution on their behalf, and the plaintiff, one of the four, has paid the solicitor's bill; (x) or where two parties agree to employ an arbitrator, and one of them pays money to take up the award. (y) But there is no *contribution between persons who have [* 1035]

(r) *Cross v. Cheshire*, 21 L. J. Ex. 3; 7 Exch. 43; *Driver v. Burton*, 21 L. J. Q. B. 157. (u) *Hussey v. Crickett*, 3 Campb. 173.

(s) *Harbert's case*, 3 Co. 13 a, 15 b. 713; *Edgar v. Knapp*, 6 Sc. N. R. 707, 158; *Holmes v. Williamson*, 6 M. & S.

(t) *Buknell v. Minot*, 4 Moore, 340; 158. (y) *Marsack v. Webber*, 6 H. & N. 561; 30 L. J. C. P. 350. *Prior v. Hembrow*, 8 M. & W. 873; *Reynolds v. Wheeler*, 10 C. B. n. s. 1, 6.

engaged to do an unlawful act, and are therefore joint tortfeasors; (z) nor where money has been paid by one of several joint contractors negligently, and not in discharge of a joint liability; (a) and it has been held that no such promise is implied, and no such liability arises, as between under-lessees of separate portions of premises holden under one original lease at an entire rent, where one only has been distrained upon or compelled under a threat of distress to pay the whole of such rent. (b)

Money paid by Mistake. — Where money has been paid by A to B's bankers at the instance and request of B under forgetfulness or a mistake of facts, A is entitled to recover back the money. (c)

Implied Request to pay. — The action for money paid is founded on the notion that the money was paid by the plaintiff for the use of the defendant at his *request*, and that the defendant, in consideration thereof, promised the plaintiff to pay him the amount so expended; for the law raises no implied promise in respect of a voluntary, unauthorized payment, which the party was not called upon or required to make on behalf of another. (d) But the law will, under certain circumstances, imply the request as well as the promise, and so support a righteous and meritorious claim. If, for example, the defendant, by neglecting to pay money which he was by law bound to pay, has cast the duty and obligation upon the plaintiff, and the latter has paid the money, not voluntarily and officiously, but by compulsion of law, the compulsion so brought upon the plaintiff by the defendant is equivalent to an express request; and proof of such compulsion will support the necessary allegation in the declaration, that the money was paid by the plaintiff for the use of the defendant at his request.

It has been held, for example, that a compulsion indirectly emanating from the defendant amounted to a constructive request in the following cases, — where the carriage of the plaintiff

(z) *Farebrother v. Ansley*, 1 Campb. 343; *Wilson v. Milner*, 2 Campb. 451. (c) *Mills v. Aldenburg*, 3 Exch. 590; and see *post*, pp. * 1038, * 1040.

(a) *Hunter v. Hunt*, 1 C. B. 300.

(d) *Lord Kenyon*, 8 T. R. 310, 311,

(b) *McIlreath v. Margetson*, 4 Doug. 278. 613; *Stokes v. Lewis*, 1 T. R. 21.

was intrusted to the defendant, a coachmaker, to be repaired, and, whilst standing on the defendant's premises, was distrained by the landlord for rent due from the defendant, and the plaintiff, in order to redeem and get back his carriage, was obliged to pay the rent; (e) where a sub-tenant paid, under a threat of distress, a ground-rent to the original lessor, which ought to have been paid * by his own immediate landlord; (f) [* 1036] also, where a tenant was compelled to pay income-tax and other outgoings and burthens on the land, which ought by law to have been paid by the lessor; (g) where an executor paid a legacy in full, inadvertently omitting to deduct the legacy duty, which he is required by act of parliament to deduct and pay to the crown, and was afterward compelled to pay such duty, the statute declaring that, in case the executor omits to deduct the duty, such duty shall become a debt due to the crown from both the executor and the legatee; (h) where the defendant omitted to furnish money for the payment of shares which he had directed the plaintiff to buy for him, and the plaintiff was obliged to resell the shares at a loss, and the action was brought for the money lost; (i) where the plaintiff had been obliged by the custom of the Stock Exchange to pay calls on shares bought by him for the defendant, which calls the defendant was bound to pay; (k) where the plaintiff, a carrier, by mistake delivered to the defendant goods consigned to a third party, and the defendant appropriated the goods to his own use, and the carrier was obliged to pay the value of them to the consignor; (l) where the defendant obtained possession of goods intrusted to the plaintiff to be sold at a fixed price, upon the terms that he should either re-deliver them to the plaintiff, or pay the price within a limited period, and the defendant refused to do either, and the plaintiff, being threatened with an action, paid the price to the owner,

(e) *Exall v. Partridge*, 8 T. R. 308;
Rodgers v. Maw, 15 M. & W. 448.

(f) *Sapsford v. Fletcher*, 4 T. R.
 512.

(g) *Baker v. Greenhill*, 3 Q. B. 148;
Graham v. Tate, 1 M. & S. 611; *Earle*
v. Maugham, 14 C. B. N. s. 626.

(h) *Hales v. Freeman*, 4 Moore, 21;
Foster v. Ley, 2 Sc. 438; *Bate v. Payne*,
 13 Q. B. 900.

(i) *Pollock v. Stables*, 12 Q. B. 765;
Smith v. Lindo, 5 C. B. N. s. 587.

(k) *Bayley v. Wilkins*, 7 C. B. 886.
 (l) *Brown v. Hodgson*, 4 Taunt. 189.

and the action was brought to recover the amount so paid; (*m*) where the plaintiff had entered into a deed of composition with his creditors upon the terms that they should receive ten shillings in the pound, and the defendant refused to sign the deed without receiving security for the payment of the residue of the debt, and the plaintiff privately gave the defendant his promissory note for the remainder of the debt, upon the terms that he should keep such note in his own hands, and the defendant, in breach of his agreement to that effect, negotiated the note, and the plaintiff was compelled to pay the amount thereof to the indorsee; (*n*) where the plaintiff agreed to grant the defendant a lease, and the lease was prepared by the plaintiff's solicitor, and the plaintiff was obliged to pay for the lease by reason [* 1037] of the defendant's refusal so to do, it being shown * that, according to the usual course of business in such cases, the lessor's solicitor prepared the lease, and the lessee paid the expense of it. (*o*) But the law raises no such implied promise from a mortgagor in favor of the mortgagee's attorney, where the negotiation for a mortgage goes off through the default of the mortgagor. (*p*) And where A, under a bill of sale, seized goods on B's premises, and with his knowledge, but without any express request, allowed them to remain there until rent became due, and, the landlord having distrained them, A paid the rent and expenses, it was held that this was not a compulsory payment by A of a debt of B for his benefit or at his implied request. (*q*)

The law also raises an implied promise in respect of money paid by the plaintiff for the use of the defendant in the following cases, — where an auctioneer has paid the auction duty on a sale of lands which were bought in by the vendor, and the

(*m*) *Longchamp v. Kenny*, 1 Doug. 137. preparing a marriage settlement, *Helps v. Clayton*, 17 C. B. n. s. 553.

(*n*) *Horton v. Riley*, 11 M. & W. 492; *Bradshaw v. Bradshaw*, 9 M. & W. 29; *Smith v. Cuff*, 6 M. & S. 160; *Atkinson v. Denby*, 30 L. J. Ex. 361; 31 L. J. Ex. 362. (*p*) *Wilkinson v. Grant*, 25 L. J. C. P. 233.

(*q*) *England v. Marsden*, L. R. 1 C. P. 529; 35 L. J. C. P. 259. See, as to this case, the remarks of Thesiger, L. J., in *Ex parte Bishop*, 15 Ch. D. 417.

(*o*) *Grissell v. Robinson*, 3 Sc. 329; 3 Bing. N. C. 10. See, as to the cost of

commissioners of excise refuse to remit the duty; (r) where a broker has paid money for his principal in the usual and known course of business, although without a direct request from the principal; (s) where the plaintiff, at the request of the defendant, has become security for him for the payment of money, and the plaintiff, by reason of the neglect of the defendant to pay at the time appointed, is compelled to pay the debt out of his own pocket; (t) where the plaintiff accepts a bill of exchange drawn on him by the defendant, and the consideration for the acceptance fails, and the plaintiff is obliged to pay the amount of the bill when due; (u) also where the plaintiff has accepted a bill for money lent by the defendant, and has become insolvent, and the defendant has agreed to a composition, and it has become his duty to indemnify the plaintiff from liability on the bill, and he has neglected so to do, and the plaintiff has been compelled to pay the amount; (x) also where the plaintiff accepts a bill of exchange, or makes or indorses a promissory note for the accommodation of the defendant, and without value or consideration, and the plaintiff is obliged to pay the bill or note when it comes to maturity, by reason of the defendant's neglect to provide the necessary funds for the purpose; (y) also where the acceptor neglects to pay a bill when * due, and the [* 1038] plaintiff, as indorser, is compelled by the holder to pay him. (z) It is sufficient, if the party paying the money shows that the legal obligation was cast upon him by the default of the defendant, and that the law compelled him to do what he has done; he need not wait for the actual issue of legal process, or abide the result of an action, in order to establish the fact of the compulsion. (a) But the law raises no implied promise out of a transaction which has been a breach of duty, and will give no

(r) *Brittain v. Lloyd*, 14 M. & W. 762; 15 L. J. Ex. 43.

(s) *Sentance v. Hawley*, 13 C. B. n. s. 458.

(t) *Fisher v. Fellows*, 5 Esp. 171; Lord Kenyon, 8 T. R. 310; *Lewis v. Campbell*, 8 C. B. 541; 19 L. J. C. P. 130.

(u) *Hooper v. Trefry*, 1 Exch. 17.

(x) *Hawley v. Beverley*, 6 Sc. N. R. 837; 6 M. & G. 221.

(y) *Bleadon v. Charles*, 5 Moo. & P. 14; 7 Bing. 246; *Reynolds v. Doyle*, 2 Sc. N. R. 45; *Driver v. Burton*, 21 L. J. Q. B. 157.

(z) *Pownall v. Ferrand*, 9 D. & R. 607; 6 B. & C. 439.

(a) *Maydew v. Forrester*, 5 Taunt. 615; *Austin v. Ward*, R. & M. 116.

assistance towards the recovery of money paid in furtherance of an illegal or immoral purpose, (b) or which a party has been compelled to pay in consequence of his own neglect. (c) If a tenant, after he has paid the income-tax, omits to deduct it from the rent, he cannot recover it from the landlord in an action for money paid. (d) It must be shown that money or its equivalent has been actually paid, (e) and that the defendant was bound to pay what the plaintiff has been compelled to pay on his behalf. (f)

SECTION II.

IMPLIED PROMISES IN RESPECT OF MONEY RECEIVED FOR THE USE OF ANOTHER.¹⁰³

Implied Promises in Respect of Money received for the Use of Another.¹ — The rules of equity upon this matter do not appear to be so strict as those of the common law; (a) and even mistakes in law, as upon the doubtful construction of a grant, (b) will in general, though not always, (c) be rectified; (d) and the reader must bear this in mind in considering the cases cited in this section. If a man, through some mistake or misapprehension, or forgetfulness of facts, has received money to which he is not justly and legally entitled, and which he ought not, [* 1039] *in foro conscientia*, to retain, the law regards him as the receiver and holder of the money for the use of the

¹ U. S. Dig. tit. *Money Received*; 4 Wait, Act. & D. c. 98, p. 469.

(b) *Pitcher v. Bailey*, 8 East, 172; (f) *Griffenhoofe v. Daubuz*, 25 L. J. Q. B. 237.

(c) *Capp v. Topham*, 6 East, 392; (a) *Daniel v. Sinclair*, 6 Ap. Cas. 181.

(d) *Cumming v. Bedborough*, 15 M. & W. 438. (b) *Earl Beauchamp v. Winn*, L. R. 2 H. L. 234.

(e) *Taylor v. Higgins*, 3 East, 169; (c) *Rogers v. Ingham*, 3 Ch. D. Maxwell v. Jameson, 2 B. & Ald. 51; 351.

Moore v. Pyrke, 11 East, 52. (d) See *post*, p. *1051, as to mistakes in accounts.

lawful owner of it, and raises an implied promise from him to pay over the amount to such owner. (e)

But it has been held that if a party makes a voluntary payment in satisfaction and discharge of some disputed claim, with full knowledge of the facts, but under ignorance of the law and from a mistake and misapprehension of his legal liability, and no fraud, or concealment, or misrepresentation has been resorted to by the other side to induce the payment, the law will not help the party so paying the money to recover it back. (f) If an action, for example, has been commenced to enforce a claim put forward by the plaintiff, and the defendant settles the action and pays money in satisfaction and discharge of such claim, and then discovers that the claim was unfounded, and that there was no cause of action, he cannot recover back the money on the ground that it was paid by mistake; for there would be no end to litigation if that were to be permitted, and disputed questions and transactions so settled and adjusted were to be opened afresh. (g) It is otherwise, however, if the party making the claim knows it to be unfounded, and wrongfully makes use of the process of the law for purposes of oppression and extortion. (h) But where the money has actually been paid under compulsory process of law, in consequence of the non-attendance of a particular witness, or the non-production of a particular document, it cannot be recovered back; for otherwise the rights of parties would never be settled, and verdicts and judgments might be rendered nugatory. (i) "The rule also has always been that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought to have paid, he cannot recover back the money,—as where a man has paid a

(e) *Kelly v. Solari*, 9 M. & W. 58; *v. Scott*, 7 C. B. 63; *Platt v. Bromage*, *Lucas v. Worswick*, 1 Moo. & Rob. 293; 24 L. J. Ex. 63; *Rogers v. Ingham*, 3 Milnes v. Duncan, 9 D. & R. 735; 6 B. Ch. D. 351.

(g) *Marriott v. Hampton*, 7 T. R. 269; *Goodman v. Sayers*, 2 J. & W. 263; *Hamlet v. Richardson*, 2 Moo. & Ecclesiastical Commissioners, 6 Q. B. D. Sc. 811; 9 Bing. 644.
(h) *Cadeval, Duke de v. Collins*, 4 Ad. & E. 858; 6 N. & M. 324.

(f) *Bilbie v. Lumley*, 2 East, 469; (i) *Marriott v. Hampton*, 7 T. R. 269; *Wilson v. Ray*, 10 Ad. & E. 88.
Brisbane v. Dacres, 5 Taunt. 143; *Higgs*

debt which was barred by the statute of limitations, or a debt contracted during infancy." (*k*)

It has been held that the law would imply a promise from the defendant to pay to the plaintiff money received under the following circumstances, — where silver was sold in

[* 1040] bars at a price to be * calculated according to the number of ounces of pure silver contained in each bar, to be

determined by an assay of the metal, and a mistake was made by the assay master, and the plaintiff, in consequence thereof, paid the defendant for a greater quantity of silver than each bar was found subsequently to contain, and the action was brought to recover the amount of such overpayment; (*l*) where the plaintiff had paid rent to the defendant, and it afterward appeared that the defendant had no right to receive such rent, and the action was brought to recover it back, the title to the land not coming into question, and not being sought to be tried in such action; (*m*) where money was paid by the plaintiff to the defendant for the purchase of a leasehold estate, and it afterward appeared that the defendant had no title to the lease. (*n*) It is not necessary, however, that money should have been actually received by the defendant, to render him liable in this form of action; but the circumstances must be equivalent to a receipt of money. (*o*) If two men reckon together, and money is passed in account, and one overpays the other by mistake or false reckoning, the overpayment may be recovered in an action for money had and received. (*p*) But the law raises no implied promise upon which an action can be maintained in respect of money had and received, from the mere fact of one man's money having come into the possession of another. (*q*) "If I apply to a man

(*k*) *Bize v. Dickason*, 1 T. R. 286.

(*l*) *Cox v. Prentice*, 3 M. & S. 349, 350.

(*m*) *Newsome v. Graham*, 10 B. & C. 234, 236; *Robinson v. Anderton*, 1 Peake, 129; *Money Penny v. Bristowe*, 2 Russ. & Mylne, 117. The courts will not suffer a title to land to be tried in an action for money had and received. *Marshall v. Hopkins*, 15 East, 313, 314; *Clarence v. Marshall*, 2 C. & M. 495.

(*n*) *Cripps v. Reade*, 6 T. R. 606.

(*o*) *Gingell v. Purkins*, 4 Exch. 726; *Spratt v. Hobhouse*, 4 Bing. 179.

(*p*) *Holt, C. J.*, 2 Ld. Raym. 1217; *Townsend v. Crowdy*, 8 C. B. n.s. 477; 29 L. J. C. P. 305.

(*q*) *Jones v. Carter*, 8 Q. B. 134; 15 L. J. Q. B. 96; *Black v. Siddaway*, ib. 359; *Robbins v. Fennell*, 11 Q. B. 248; *Foster v. Green*, 7 H. & N. 881; 31 L. J. Ex. 158.

for payment of a debt, and some third person pays me, he cannot recover back the money merely because he has paid it under some misapprehension." (r) It is necessary, to maintain this action, that a certain amount of money belonging to one person should have improperly come into the hands of another, (s) and that there should be some privity between them. (t)

When Money paid by Mistake cannot be recovered back. — If trustees or agents represent that they have funds in their hands belonging to the parties for whom they act, and allow them to draw out the same and spend it as their own, the trustees or agents cannot recover back the money. Neither can they retain other moneys in their hands belonging to these same parties by way of indemnity. (u) The law raises [* 1041] no implied promise in respect of money had and received where the rights of the receiver of the money have been prejudiced by the mistake, and it would be inequitable to compel him to refund the amount. (x) Nor can money be recovered back which was allowed by mistake on a settlement of accounts, where there were cross-demands, and the settlement was made on the basis of adjusting differences and disputes between the parties. (y)

Money improperly received and wrongfully detained. — If one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money is, in contemplation of law, money received for the use of the injured party. It is not the money of the wrong-doer; he has no right to retain it; and the law, therefore, implies a promise from him to return it to the rightful owner, whose title to it cannot be destroyed and annulled by the fraudulent and unjust dispossession. (z) It has been held that the defendant is indebted to the plaintiff in respect of

(r) *Martin, B., Aiken v. Short*, 1 H. Q. B. 362; *Gibbs, J., Brisbane v. Dacres*, 5 Taunt. 152; and see *Cave v.*

(s) *Follett v. Hoppe*, 17 L. J. C. P. 76. *Mills*, 7 H. & N. 913; 31 L. J. Ex. 265.

(t) *Watson v. Russell*, 5 B. & S. 968; (x) *Watson v. Moore*, 33 Law T. R. 31 L. J. Q. B. 304; 34 L. J. Q. B. 93. 121; *Shand v. Grant*, 15 C. B. n. s. 324.

(u) *Skyring v. Greenwood*, 4 B. & C. (y) *Lee v. Merrott*, 8 Q. B. 820.

290; *Shaw v. Picton*, ib. 729; *Shaw v. Dartnall*, 6 ib. 65; *Shaw v. Woodcock*, 20 L. J. Ex. 250; *Chowne v. Baylis*, 31 7 ib. 85; *Reg. v. Treasury (Lords)*, 16 L. J. Ch. 757.

“money had and received by the defendant for the use of the plaintiff,” in the following cases,—where a man, having a claim or lien to a certain amount on goods and securities in his possession, unlawfully refuses to give them up without receiving more than he is strictly entitled to claim, or, having no lien at all upon them, wrongfully refuses to give them up without being paid for so doing, and the owner, in order to get the goods or securities, is obliged to satisfy and discharge the extortionate demand; (a) where a railway company or carrier makes excessive charges for the conveyance of goods, and the consignee, in order to get possession of the goods, pays the extortionate demand; (b) where a married man, pretending to be single, marries a lady, and under color of such pretended marriage, gets possession of her estates, and receives the rents; (c) where one man takes and wrongfully pledges (d) or sells the goods of another, and receives the price; (e) or claims or receives rents or [* 1042] money under a false or * pretended authority, (f) or under the coercion of threatened penal proceedings; (g) or wrongfully usurps the office of another, and receives the fees annexed thereto; (h) or receives a masquerade ticket to be sold or re-delivered, and refuses to re-deliver it, the presumption being in such a case that he has sold it and received the money. (i)

The action upon such implied promise lies also against an agent who wrongfully demands and receives money in the name and on behalf of his principal, although he may have paid the money over to the latter; (k) or a principal who has obtained

(a) *Astley v. Reynolds*, 2 Str. 915; 1216; *Edwards v. Scarsbrook*, 3 B. & S. 280; 32 L. J. Q. B. 45.

(b) *Ashmole v. Wainwright*, 2 Q. B. 837; *Kent v. Great Western Ry. Co.*, 3 C. B. 715; *Parker v. Bristol & Exeter Ry. Co.*, 6 Exch. 702; 30 L. J. Ex. 442; *Baxendale v. Great Western Ry. Co.*, 16 C. B. n. s. 137; 32 L. J. C. P. 225; 33 ib. 197; *Great Western Ry. Co. v. Sutton*, L. R. 4 H. L. 226; 38 L. J. Ex. 177.

(c) *Hasser v. Wallis*, Salk. 28. (f) *Robson v. Eaton*, 1 T. R. 62; *Dupen v. Keeling*, 4 C. & P. 102.

(g) *Unwin v. Leaper*, 1 M. & Gr. 752. (h) *Howard v. Wood*, 2 Lev. 245; 2 Jon. 127; *Arris v. Stukeley*, 2 Mod. 263; *Hall v. Swansea*, 5 Q. B. 548; *Boyter v. Dodsworth*, 6 T. R. 681.

(i) *Longchamp v. Kenny*, 1 Doug. 137.

(d) *Allanson v. Atkinson*, 1 M. & S. 583. (k) *Snowden v. Davis*, 1 Taunt. 359; but see *Holland v. Russell*, 30 L. J. Q. B. 308.

(e) *Lamine v. Dorrell*, 2 Ld. Raym. Q. B. 308.

money through the medium of a fraud committed by his agent; (*l*) or a solicitor who wrongfully exacts money, either on his own account or on behalf of his client, as the price of the liberation of deeds or securities unjustly and illegally detained by him on behalf of such client; (*m*) or who extorts more than the principal and interest due on a mortgage deed, and the costs, under a threat of the exercise of a power of sale; (*n*) or a parish clerk who demands and receives on behalf of the rector a greater sum for searches in the parish register than he is entitled to charge; (*o*) or a vestry clerk who wrongfully receives and detains, by the direction of the vestry, burial fees which belong to the rector; (*p*) or a steward of a manor who exacts exorbitant fees from tenants on their admittance, (*q*) or who demands and receives an extravagant charge as the condition of his producing deeds and court-rolls in his custody, which the party paying the money could not do without, and which the steward ought to have produced on tender of a reasonable compensation; (*r*) or a broker in possession of goods under a distress who demands and receives unauthorized and excessive charges; (*s*) or a sheriff who exacts a larger fee than the law allows for executing the Queen's writ; (*t*) or who obtains money under the pressure of an illegal arrest (*u*); or under a threat to sell goods seized under a *fi. fa.* which he has no right to sell; (*x*) or a justice of the peace who exacts a fee from a publican as the condition of granting him a license; (*y*) or a toll-collector * who exacts an illegal [* 1043] or unauthorized toll; (*z*) or an overseer of the poor who levies money by seizing and selling goods upon a magistrate's conviction which is afterward quashed; (*a*) or a revenue officer

(*l*) *Crockford v. Winter*, 1 Campb. 127.

(*m*) *Smith v. Sleep*, 12 M. & W. 588; *Wakefield v. Newbon*, 6 Q. B. 280; 13 L. J. Q. B. 258.

(*n*) *Close v. Phipps*, 8 Sc. N. R. 381; 7 M. & G. 586; see *Fraser v. Pendlebury*, 31 L. J. C. P. 1.

(*o*) *Steele v. Williams*, 8 Exch. 625.

(*p*) *Spry v. Emperor*, 6 M. & W. 639.

(*q*) *Traberne v. Gardner*, 5 Ell. & Bl. 942.

(*r*) *Spry v. Pigott*, cited 2 Esp. 723.

(*s*) *Hills v. Street*, 2 Moo. & P. 103.

(*t*) *Dew v. Parsons*, 2 B. & Ald. 562.

(*u*) *Payne v. Chapman*, 4 Ad. & E. 364; *Baron de Mesnil v. Dakin*, L. R. 3 Q. B. 18; 37 L. J. Q. B. 42.

(*x*) *Valpy v. Manley*, 1 C. B. 602.

(*y*) *Morgan v. Palmer*, 3 B. & C. 729; 4 D. & R. 283.

(*z*) *Lewis v. Hammond*, 2 B. & A. 206; *Waterhouse v. Keen*, 4 B. & C. 200; 6 D. & R. 257.

(*a*) *Feltham v. Terry*, Bull. N. P. 131 a; cited 1 T. R. 387; 1 Cowp. 419.

who unlawfully seizes goods as forfeited, and unlawfully detains them, and takes money which he has no right to take as the condition of their release; (b) or a nurse who, upon the death of a person she attends, carries away his money; (c) or a creditor who has received money as the condition of his signing a bankrupt's certificate; (d) or who has received money from a bankrupt as the price of his discharge from an arrest, having at the time notice of the bankruptcy; (e) or who has openly joined other creditors in executing a deed of composition with a debtor consenting to take a composition, but has privately stipulated for and accepted payment of the residue of his debt, and the action is brought to recover back the amount so paid. (f)

The action upon such implied promise lies, moreover, against all persons who extort money for doing what they are by law bound to do without payment or reward; (g) and who receive and have in their possession and wrongfully detain the money of another; "for," as it has been justly observed, "no man will venture to take, if he knows that he is liable to refund." (h) Upon a statement of claim properly framed for that purpose, the plaintiff may recover interest on the money detained by way of damages for being kept out of the use of the money. (i)

Money received upon a Consideration that has failed.—The law raises also an implied promise to pay back money that has been received without consideration, or upon a consideration that has failed; and an action may be maintained upon such implied promise by the grantee of an annuity to recover back money paid for an annuity which has been set aside, or has become void for want of registry or enrolment; (k) also to recover money

- (b) *Irving v. Wilson*, 4 T. R. 485; *n. s.* 188; *Geere v. Mare*, 2 H. & C. 339; *Atlee v. Backhouse*, 3 M. & W. 645. 33 L. J. Ex. 50; *In re Leuzberg's Policy*, 7 Ch. D. 650.
 (c) *Thomas v. Whip*, Bull. N. P. 130 a. (g) *Parker v. Great Western Ry. Co.*, 7 Sc. N. R. 835, 874.
 (d) *Smith v. Bromley*, 2 Doug. 697, in notis; *Sievers v. Boswell*, 4 Sc. N. R. 173. (h) *Jones v. Barkley*, 2 Doug. 690.
 (e) *Follett v. Hoppe*, 17 L. J. C. P. 76. (i) *Per Pollock, C. B., Sutton v. South-Eastern Ry. Co.*, L. R. 1 Ex. 32, 37.
 (f) *Bradshaw v. Bradshaw*, 9 M. & W. 29; *Smith v. Cuff*, 6 M. & S. 160; *Atkinson v. Denby*, 7 H. & N. 934; 31 L. J. Ex. 362; *Clay v. Ray*, 17 C. B. Mansell, 3 Taunt. 56; *Huggins v.*

paid to an auctioneer as a deposit on the sale of an estate, when the title is defective, and the purchase consequently cannot be completed; (*l*) * or if the estate does not [* 1044] correspond with the description given of it in a printed particular; (*m*) or money paid to a broker by his principal in the belief that an order has been duly executed, where the contract made by the broker is not in compliance with the order; (*n*) also to recover money received as a consideration or bonus for a lease by a person who is subsequently found to have no right to grant the lease; (*o*) or paid on a conditional sale which has been abandoned or rescinded, and the goods returned; (*p*) or on a purchase of a good-will or fixtures, shares or chattels, when the things contracted for, or some of them, have not been transferred or delivered; (*q*) or on the purchase of goods sold by the vendor as his own which the true owner has claimed from the purchaser; (*r*) or money paid as a premium upon a policy of insurance when the risk insured against was not run; (*s*) or money paid on a bill of exchange where there is no consideration for the bill, (*t*) or the consideration has failed; (*u*) or to the promoters of a scheme who promise to carry out their plan for the benefit of the subscribers, but afterward abandon it without their consent; (*x*) or money paid to parish officers for the support of a bastard child when the child dies before the money has been expended; (*y*) or conduct money paid to a party upon a subpoena as a witness where the cause is settled, and the sub-

- Coates, 5 Q. B. 432; 13 L. J. Q. B. 46; Newton, 2 C. M. & R. 127; Wilkinson
Turner v. Browne, 3 C. B. 157; 15 L. v. Lloyd, 7 Q. B. 44; Devaux v. Conol-
ly, 8 C. B. 640; 19 L. J. C. P. 71.
J. C. P. 223; Weddell v. Lynam, 2 Esp.
310 (r) Eichholz v. Bannister, 34 L. J.
C. P. 105.
(l) Burrough v. Skinner, 5 Burr. C. P. 105.
2639. (s) Stevenson v. Snow, 3 Burr. 1240.
(m) Ante, p. * 884. (t) Cobden v. Kendrick, 4 T. R.
(n) Bostock v. Jardine, 3 H. & C. 432.
700; 34 L. J. Ex. 142. (u) Hooper v. Treffrey, 1 Exch. 17;
(o) Cripps v. Reade, 6 T. R. 606; 16 L. J. Ex. 233.
Wright v. Colls, 19 L. J. C. P. 60; 8 (x) Nockells v. Crosby, 5 D. & R.
C. B. 164. 751; 3 B. & C. 824; Kempson v. Saun-
(p) Hurst v. Orbell, 8 Ad. & E. 107; ders, 4 Bing. 5; 12 Moore, 44.
Street v. Blay, 2 B. & Ad. 462. (y) Chappell v. Poles, 2 M. & W.
(q) Anon., 1 Str. 407; Wright v. 867.

pena is not acted upon; (z) or to the holder of a bill, or bank note, or other security, who has presented it to the plaintiff to be discounted, and got the money, and the bill turns out to be a forgery, (a) if the plaintiff has given prompt notice of the forgery to the holder, and has not been guilty of *laches*. (b) The action also may be maintained to recover back money received under a special contract which has been abandoned or rescinded, or the performance of which has been prevented by the wrongful act of the party who has received the money. (c)

Money received under an Illegal Contract. — The [*1045] law, also, so long *as an illegal contract continues executory, implies from the person who has received money in furtherance of the execution of the contract, a promise to refund it in favor of the party who paid the money, and who repudiates the illegal transaction; (d) and an action upon this implied promise may be maintained against a person who has received money upon an illegal insurance or wager, at any time before the happening of the event which is to decide the adventure; (e) also against a stakeholder with whom money has been deposited to abide the event of an illegal wager, who has not paid over the money to the winner, or who pays it over after he has received notice not to do so from the party who has deposited the money in his hands; (f) and against parish officers who

(z) *Martin v. Andrews*, 7 Ell. & Bl. 1; 26 L. J. Q. B. 39. not carried out, it was held they might be recovered. *Taylor v. Bowers*, 1 Q. B. D. 291.

(a) *Jones v. Ryde*, 5 Taunt. 488; 1 Marsh. 163; *Wilkinson v. Johnston*, 3 B. & C. 428; 5 D. & R. 403; *Fuller v. Smith, R. & M.* 49; *Gurney v. Womesley*, 4 Ell. & Bl. 143. (e) *Varney v. Hickman*, 17 L. J. C. P. 102; 5 C. B. 271; *Clarke v. Shee*, 1 Cowp. 197; *Tenant v. Eliot*, 1 B. & P. 3; *Farmer v. Russell*, ib. 296; *Tappenden v. Randall*, 2 B. & P. 467; *Sykes v. Beadon*, 11 Ch. D. 170.

(b) *Price v. Neale*, 3 Burr. 1357; 1 W. Bl. 390; *Smith v. Mercer*, 6 Taunt. 76; *Cocks v. Masterman*, 9 B. & C. 902. (f) *Hodson v. Terrill*, 1 C. & M. 797; 3 Tyr. 929; *Robinson v. Mearns*, 6 D. & R. 26; *Hastelow v. Jackson*, 8 B. & C. 221; *Mearing v. Hellings*, 14 M. & W. 711; 15 L. J. Ex. 168; *Pickard v. Bankes*, 13 East, 20; *Bone v. Eckless*, 5 H. & N. 925; 29 L. J. Ex. 438; *Hampden v. Walsh*, 1 Q. B. D. 189.

(c) *Towers v. Barrett*, 1 T. R. 133; *Giles v. Edwards*, 7 T. R. 181; *Smith v. Mundy*, 29 L. J. Q. B. 172; *Ehrenspurger v. Anderson*, 3 Exch. 159.

(d) *Palyart v. Leckie*, 6 M. & S. 290. So also where goods were delivered for a fraudulent purpose, but the purpose was

wrongfully receive money under an illegal contract, although they have quitted office, and handed over the money received to their successors. (g) An illegal contract cannot be directly enforced by specific performance, nor can it be indirectly enforced by claiming damages for a breach; but it does not follow that in some cases money cannot be recovered which has been paid over to third persons in pursuance of such contract, or that in some cases moneys may not be recovered from the parties to the contract which they have become possessed of by representations that the contract was legal, and which belonged to the persons who seek to recover them. (h) The law also implies a promise to refund money received under an illegal contract, where the plaintiff does not stand *in pari delicto* with the defendant. Where contracts, for example, are prohibited by statute, for the purpose of preventing one set of men from taking advantage of the necessities of others, and money is paid upon such contracts by one of those whom the law intended to protect, the person who has so paid his money does not stand *in pari delicto* with the person who has received it, and may, after the forbidden transaction is completed, bring an action upon a promise implied by law from the person who has got the money to refund it. (i) An action upon such implied promise may be maintained to recover back money privately paid to a creditor to induce him to sign a bankrupt's certificate, (k) or to recover from *a cred- [* 1046] itor money paid to the indorsee of a bill of exchange, or the assignee of a policy of insurance, originally given to the creditor to induce him to sign a composition deed, (l) or money paid to a lottery-office keeper for insuring tickets contrary to the statute. (m)

Money received by Agents. — If a broker or commission agent, employed to sell, effects a sale and receives the purchase-money,

- (g) *Chappell v. Poles*, 2 M. & W. 867. (l) *Smith v. Cuff*, 6 M. & S. 165, 166; *Alsager v. Spalding*, 4 Bing. n. s. 407; 6 Scott, 204; *Smith v. Bromley*, 2 Doug. 695.
- (h) *Sykes v. Beadon*, 11 Ch. D. 170. (m) *Jaques v. Withy*, 1 H. Bl. 65; 2 Bl. R. 1073; *Clarke v. Shee*, 1 Cowp. L. J. Ex. 362; *In re Leuzberg's Policy*, 197; *Browning v. Morris*, 2 ib. 790.
- (i) *Williams v. Hedley*, 8 East, 378. (k) *Lowry v. Bourdieu*, 2 Doug. 472; *Atkinson v. Denby*, 7 H. & N. 934; 31 L. J. Ex. 362; *In re Leuzberg's Policy*, 7 Ch. D. 650.

and refuses to pay over the amount to his employer after deducting his commission, an action for money had and received may be maintained against him; (n) also against a sharebroker who has received money from his principal to buy shares, and the authority to buy is countermanded before the purchase has been made; (o) but not where the commission has been executed before countermand, and the shares have been bought, although they may subsequently turn out to be forgeries. (p) If an agent refuses to account for goods delivered to him for sale, it shall be presumed after a reasonable time that he has sold them and received the proceeds in money. (q) A solicitor employed to sell real estate who, as the agent of the vendor, receives a deposit from the purchaser, is not entitled to retain it as a stakeholder until the completion of the purchase, but must pay it over to the vendor on demand. (r)

The mere circumstance of money having been paid by a principal to his agent, with directions to pay it to a third person, imposes no liability upon the agent to such third person, unless there is an express or implied assent on the part of the agent to pay the money according to the directions he has received. (s) Whenever one man agrees to receive money for the use of another upon consideration executed, however frivolous or void the consideration might have been in respect of the person paying the money, if it were not absolutely immoral or illegal, the person so receiving it cannot be permitted to gainsay his having received it for the use of the other. (t) If an agent authorized to receive money for his principal employs a third party to receive it, there is, it seems, no implied promise from the latter to pay over the money to the principal, but only to his own immediate employer, the agent. Therefore if a client in the country employs a country solicitor to recover a debt, and the money is received by the town agent of the country solicitor, such money is not money had and received by him for the use of the client, but for the use of his own employer; and

(n) *Bousfield v. Wilson*, 16 M. & W. 185.

(o) *Fletcher v. Marshall*, 15 M. & W. 763.

(p) *Lamert v. Heath*, ib. 486.

(q) *Hunter v. Welsh*, 1 Stark. 224.

(r) *Edgell v. Day*, L. R. 1 C. P. 80; 35 L. J. C. P. 7.

(s) *Ante*, p. * 72.

(t) *Griffith v. Young*, 12 East, 51

the client, consequently, cannot recover it from the town agent. (u) But the town agent may, under certain circumstances, make himself liable to the client in respect of money received by him; and the court in the exercise of its summary jurisdiction over its own officers will often compel a London agent to pay such money to the client, "to enforce justice according to the equity of the individual case." (x)

It is a general rule of law that, if money be paid to a known agent for the use of his principal, an action for money had and received cannot be sustained against the agent, if it appears that the principal has the least color of right to the money; for the courts will not try the right of the principal in an action against the agent. But if the payment of the agent is void *ab initio*, so that the money never was received by him for the use of his principal, and he is consequently not accountable to the latter for it, he is bound to refund the amount, if he has not actually paid it over at the time he receives notice of the mistake, or if he has not given credit in account to his principal for it, and the account has not been stated and settled between them on that footing. (y) If, however, he has got money into his own hands by a wrongful detainer of goods, or by his own illegal act, he cannot discharge himself from liability by paying it over. (z) When the person who has received the money is in ignorance of the facts which entitle the other party to recover it back, the obligation to repay it does not arise until after demand has been made. (a)

Receipt of Foreign Money. — It is immaterial whether the money received by the defendant was English money or foreign currency. (b)

(u) *Cobb v. Becke*, 6 Q. B. 930; *Robbins v. Fennell*, 11 Q. B. 248; 17 L. J. Q. B. 77; *Hurley v. Baker*, 16 M. & W. 26; see *ante*, p. *476.

(x) *Robbins v. Heath*, 12 Jur. 158; *Hanby v. Cassin*, 11 Jur. 1088; 17 L. J. Q. B. 79; see *ante*, p. *476.

(y) *Holland v. Russell*, 1 B. & S. 424; 4 B. & S. 14; 30 L. J. Q. B. 308;

32 ib. 297; *Shand v. Grant*, 15 C. B. N. S. 324; *Lloyd v. Sandilands*, Gow. 13.

(z) *Addison on Torts* (5th ed., by Cave), p. 88.

(a) *Freeman v. Jeffries*, L. R. 4 Ex. 189; 38 L. J. Ex. 116.

(b) *Ehrensperger v. Anderson*, 3 Exch. 157. ♦

[* 1048]

* SECTION III.

IMPLIED PROMISES IN RESPECT OF ACCOUNTS STATED.¹⁰⁴**Of the Implied Promise in Respect of an Account stated.¹—**

If an account has been stated and settled between persons who have cross claims against each other, the law implies a promise from those against whom the balance appears to pay over the amount of such balance to the others; and any admission made by the defendant of some definite balance being against him, or of a certain sum being due from him to the plaintiff, will be evidence of an "account stated," and raise an implied promise to pay over the amount. (a) And the promise will be applied where the account is stated in respect of one item only as well as in the case of a plurality of items; (b) but a general admission of liability to a pecuniary demand, without specifying the amount of it, will not support an "account stated," and will not entitle the plaintiff to recover nominal damages. (c) Nor is an offer to pay a sum less than the sum claimed, if unaccepted, any evidence of an account stated in an action for the larger sum. (d)

¹ U. S. Dig. and Ann. Dig. 1870-78, tit. *Accounts*; Ann. Dig. 1879, &c., tit. *Assumpsit*, V. b.

An "account closed," or an "account rendered," is not necessarily an account stated; an account may be closed by death of a party, or rendered without any circumstances to imply an admission of its correctness. Ang. Lim. 150.

Definition and nature of an account stated, see 6 Wait, Act. & D. 424, 425; what is essential in stating an account, ib. 424; what is not an account stated, ib. 426.

What constitutes an account stated, as between stockbroker and customer, see Dos Passos, Stockb. 158.

(a) Knowles v. Michel, 13 East. 249; M. & W. 562; Penny v. Slade, 15 L. J. Laycock v. Pickles, 4 B. & S. 497; 33 Q. B. 10; 8 C. B. 115.

L. J. Q. B. 43; Prouting v. Hammond, (b) Highmore v. Primrose, 5 M. & S. 8 Taunt. 688; Gow. 41; Ashby v. Ash- 67.

by, 3 Moo. & P. 186; Porter v. Cooper, 1 (c) Lane v. Hill, 21 L. J. Q. B. 318; C. M. & R. 394-5; Davies v. Wilkinson, 16 Jur. 496; Bernasconi v. Anderson, 1 10 Ad. & E. 98; Chisman v. Count, 2 M. & M. 183.

Sc. N. R. 569; Purdon v. Purdon, 10 (d) Atkinson v. Woodall, 31 L. J. M. C. 174.

An I O U, being a distinct admission of a sum due, is *prima facie* evidence of an account stated, and of a promise to pay the amount to the person who is in possession of the document; (*e*) but the effect of it may be got rid of, where it is the only item of evidence of account, by showing that there was no debt, and no demand which could be enforced by virtue of it. (*f*) Where the plaintiff lent money to A upon B's promise to become surety for its repayment, and, on the money being advanced, A and B signed and delivered to the plaintiff the following memorandum, — "We jointly and severally owe you £60," it was held to be evidence of an account stated by A and B jointly. (*g*) The law also will imply a promise to pay over money, where the drawer of a bill overdue and unpaid has promised to pay the indorsee and holder; (*h*) also where partners have settled accounts on the close of their partnership, and an ascertained balance is admitted to be due from the one to the * other. [* 1049] Wherever the defendant has got the benefit of the fulfilment of a contract, performance of which could not have been enforced by reason of the statute of frauds, and has subsequently admitted that a certain sum is due to the plaintiff in respect thereof, the debt so admitted may be recovered on an account stated. (*i*) Thus, where the defendant agreed to pay the plaintiff £100 if the plaintiff would surrender a farm to the defendant, and get the landlord to accept the defendant as tenant in the place of the plaintiff, and the change of tenancy was effected, and the defendant afterward admitted that he owed the plaintiff the £100, it was held that the plaintiff was entitled to recover the money on the account stated. (*k*) But the law implies no promise from an infant, or lunatic, or person incapable of contracting, in respect of an account stated. (*l*) Nor can a claim which is absolutely void by reason of an illegality or immorality

(*e*) *Payne v. Jenkins*, 4 C. & P. 324; *Curtis v. Rickards*, 1 Sc. N. R. 155; 1 Man. & Gr. 46; *Gould v. Coombs*, 1 C. B. 543; *Fesenmayer v. Adcock*, 16 M. & W. 450.

(*f*) *Lemere v. Elliott*, 6 H. & N. 656; 30 L. J. Ex. 350.

(*g*) *Buck v. Hurst*, L. R. 1 C. P. 297.

(*h*) *Oliver v. Dovatt*, 2 M. & Rob. 230.

(*i*) *Salmon v. Watson*, 4 Moore, 73.

(*k*) *Cocking v. Ward*, 1 C. B. 858; *Griffith v. Young*, *ante*, p. * 162; *Seago*

v. Deane, 4 Bing. 459; 1 M. & P. 227.

(*l*) *Tarback v. Bispham*, 2 M. & W. 7.

in the consideration, or for want of consideration, as a promise to pay money to counsel for services connected with litigation, be relied upon in support of a count upon an account stated. (*m*) And an admission by the defendant of a debt due to a solicitor for his services as such will not enable the solicitor to recover on an account stated so as to defeat the provisions of the statute requiring a signed bill to be delivered by the solicitor before action. (*n*)

Account stated with Trustees.—If a trustee states an account with his *cestui que trust*, and admits that he has money in his hands applicable to a claim made on him by the latter, he is no longer a trustee merely of that money, but becomes liable as a debtor to the *cestui que trust*. (*o*) If he acknowledges that he owes the latter a specific sum, the law implies a promise from him to pay the amount. But so long as the trust remains open, and the accounts are unadjusted, and an ascertained balance has not been admitted to be due, or if admitted, has been the result of a clear mistake, no such implied promise arises. (*p*) Where a creditor received goods from his debtor upon trust to sell and apply the proceeds in liquidation of the debt due to him, and hand over any balance that might remain to the debtor after the sale, and the goods were sold, and the creditor admitted that he had a balance in hand of £5 19s., it was held that he was liable for the amount on an "account stated." (*q*) But where trustees for the separate use of the wife admitted that they had [* 1050] received * and held a certain sum to her separate use, and refused to pay it over without her separate receipt, it was held that an action on an account stated would not lie by the husband and wife for the sum so admitted to be due to her. (*r*)

A defendant who has admitted that he owes a certain sum of money to the plaintiff, and has recognized the title of the latter

(*m*) *Kennedy v. Broun*, 13 C. B. n. s. 677; 32 L. J. C. P. 137; *Lubbock v. Tribe*, 3 M. & W. 613.

(*n*) *Brooks v. Bockett*, 9 Q. B. 847; *Scadding v. Eyles*, 9 Q. B. 858.

(*o*) *Topham v. Morecraft*, 8 Ell. & Bl. 983.

(*p*) *Roper v. Holland*, 3 Ad. & E. 99.

(*q*) *Howard v. Brownhill*, 23 L. J. Q. B. 23.

(*r*) *Bond v. Nurse*, 16 L. J. Q. B. 196.

to the money, cannot of his own accord set up a *jus tertii* for the purpose of defeating the plaintiff's claim; (s) but if the plaintiff was only an agent in the transaction, dealing on behalf of an undisclosed principal, and the latter intervenes and gives the defendant notice not to pay the debt to the plaintiff, the defendant's liability to the latter is discharged. (t)

Settlement of Mutual Accounts.¹—Where there are mutual accounts and mutual debts and credits, and the parties meet and

¹ U. S. Dig. tit. *Accounts*, I.; Ann. Dig. tit. *Accounts*.

Where accounts have been voluntarily rendered and settled between the parties concerned, the presumption is that all items chargeable at the date of settlement were included (*Bull v. Harris*, 31 Ill. 487; *Lee v. Reed*, 4 Dana, 109; *Bourke v. James*, 4 Mich. 336; *Kennedy v. Williamson*, 5 Jones L. 284; *Rowe v. Collier*, 25 Tex. 252); that the accounting is just (*Carroll v. Paul*, 16 Mo. 226); that the balance shown is the true balance due (*Farmer v. Barnes*, 3 Jones, Eq. 109); that an order previously given to a third person is included (*Alabama, &c. R. R. Co. v. Sanford*, 36 Ala. 703). But such presumption is not conclusive; upon clear proof that an item was not included nor relinquished, it may be recovered. *Bull v. Harris*, 31 Ill. 487; *Lee v. Reed*, 4 Dana, 109; *Kennedy v. Williamson*, 5 Jones, L. 284; *Bourke v. James*, 4 Mich. 336; *Mills v. Geran*, 22 Ala. 669.

Where an account duly rendered to the party charged is retained by him beyond a reasonable time for examination, without objection, the presumption arises that he acquiesces in it as correct. *Sheppard v. Bank of Missouri*, 15 Mo. 141; *Freeland v. Heron*, 7 Cranch, 147; *Webb v. Chambers*, 3 Ired. L. 374 (to the contrary, *Robertson v. Wright*, 17 Gratt. 534). But this presumption may be rebutted, even after the balance of the account has been paid, and by evidence of the course of dealing between the parties only, or of circumstances tending to qualify the implied admission. *Lockwood v. Thorne*, 18 N. Y. 285; *Zugg v. Turner*, 8 Iowa, 223. Where an original entry in an account-book was afterward altered, it was held that the entry must be presumed to be in accordance with the fact at the time of entry, if the alteration were not explained. *Sheils v. West*, 17 Cal. 324. And where a father was greatly embarrassed, and one of his sons took charge of his affairs and farm, and for years they lived together, and the son, devoting his entire time to the farm, by his skill and industry relieved his father of debt, and greatly enhanced the permanent value of the estate, it was held, in proceedings for an account after the death of the father, that the father and son would, in the absence of any proof to the contrary, be presumed to have settled their accounts as they went along, to their mutual satisfaction. *Evans v. Evans*, 2 Coldw. 143.

In general, upon the opening of an account which has been settled by note, the burden of proof is on the party objecting to the settlement. *Mills v. Johnston*, 23 Tex. 308. Where the parties made their settlement, subject to a re-settlement in case the court should decide the value of Confederate money involved, more favorably to the creditor than the rate allowed him, it was held that, before he could recover, on that theory, he must show that the court had settled the rule to be as the contract provided. *Milledgeville Manuf. Co. v. Rives*, 44 Ga. 479. When an account made out by a creditor appears receipted, the presumption is that it was paid by the debtor. *Harrison v. Harrison*, 9 Ala. 73.

(s) *Peacock v. Harris*, 10 East, 107.

(t) *Ante*, p. * 467.

settle their respective claims and liabilities and strike a balance, the account cannot be re-opened on the ground of the existence of overcharges or insufficient charges, or on the ground of some mistake as to legal rights, (u) or on the ground that some of the claims and demands so taken into account were demands for which no action could have been maintained, or were only equitable or moral claims. "The real account stated," observes Blackburn, J., "called in our old law an *insimul computassent*, is where several items of claim are brought into account on either side, and, being set one against another, a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side. It is then the same as if each item was paid, and a discharge given for each, and in consideration of that discharge the balance was agreed to be due." It is not necessary, in order to make out an account stated of this sort, that the debts should be debts *in presenti*, or that they should be legal debts, (x) or be legally recoverable; for where parties having cross demands against each other settled and balanced their accounts, and an action was brought for the balance, it was held that the settlement bound the defendant, and that he could not set up as a defence that some of the items of the account with which he had been debited were not recoverable by reason of the statute regulating the sale of spirituous liquors, (y) or by reason of the statute of frauds. (z) In these cases of a real account stated, the claims and demands on either side are merged in the account stated, so that the parties cannot afterward resort to them. Thus if A sell his horse to B for £10, and [* 1051] there being divers other dealings between * them, they come to an account upon the whole, and B is found in arrear £5, A must sue for the balance upon the account stated, for his claim for the price of the horse is discharged. (a)

Mistakes in Accounts.¹— But a party who had admitted the

¹ U. S. Dig. tit. *Accounts*, II.; Ann. Dig. 1870-78, tit. *Accounts*.

The fact that the parties have adjusted the account and agreed on a balance, is

(u) *Dawson v. Remnant*, 6 Esp. 24.

(z) *Laycock v. Pickles*, *supra*.

(x) *Laycock v. Pickles*, 4 B. & S. 506; 33 L. J. Q. B. 47.

(a) North, C. J., *Milward v. Ingram*, 2 Mod. 44; *Laycock v. Pickles*, *supra*.

(y) *Dawson v. Remnant*, 6 Esp. 24.

correctness of an account is not conclusively bound by it. (b) He may show that the admission was made under a mistake, (c) or that certain items were miscalculated or founded in error, (d) provided the correction is promptly made before the other party has innocently acted upon the faith of the correctness of the account, and altered his previous position so as to render it inequitable to call upon him to refund the money. (e) Although under certain circumstances the giving credit in account may be treated as so far equivalent to payment under mistake of law as to prevent sums wrongly credited being recoverable at law, yet in equity they may be sometimes recovered. (f)

in general a defence to a bill for an accounting; but the defence may be rebutted by showing fraud, mistake, &c., affecting the balance. 3 Wait, Act. & D. 170. When an account stated may be opened, 6 Wait, Act. & D. 427; to what extent and on what proof, *ib.* 428.

For explanation of the leave granted to a complainant to "surcharge and falsify" an account stated which defendant has pleaded to a bill for an accounting, see *Bisp. Eq. sect. 479*; 4 *Bouv. Inst.* 224; 3 *Wait, Act. & D.* 170.

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| <p>(b) <i>Shand v. Grant</i>, 15 C. B. n. s. 324.</p> <p>(c) <i>Thomas v. Hawkes</i>, 8 M. & W. 140.</p> <p>(d) <i>Rose v. Savory</i>, 2 Sc. 199; 2 Bing. N. C. 145; <i>Cox v. Prentice</i>, 3 M. & S. 344; <i>Lucas v. Worswick</i>, 1 Moo. & Rob. 295.</p> | <p>(e) <i>Holt, C. J., Spurraway v. Rogers</i>, 12 Mod. 517; <i>Dawson v. Remnant</i>, 6 Esp. 24; <i>Knox v. Whalley</i>, 1 Esp. 1; <i>Skyring v. Greenwood</i>, <i>Shaw v. Picton</i>, <i>Lee v. Merritt</i>, <i>Shand v. Grant</i>, <i>supra</i>.</p> <p>(f) <i>Daniel v. Sinclair</i>, 6 Ap. Cas. 181.</p> |
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* BOOK IV.

OF STAMPS ON CONTRACTS.

CHAPTER I

GENERAL PRINCIPLES.

The Stamp Act,¹ 1870. — The Stamp Act, 1870, (a) which came into operation on the 1st of January, 1871, consolidates and

¹ For former acts of congress requiring stamps to be affixed to certain written instruments, see Act of June 30, 1864, sect. 151; 13 Stat. at L. 291; Act of Mar. 3, 1865, sect. 1, ib. 481; Act of July, 13, 1866, 14 ib. 141; Act of June 23, 1874, c. 462, sect. 1, 18 ib. 250. See Edwards, Stamp Act (2d ed. 1863).

For decisions of Federal courts on the construction and operation of these laws, see *James v. Blauvelt*, 16 Law Rep. n. s. 485; *United States v. Baltimore, &c. R. R. Co.*, 7 Am. L. Reg. n. s. 757, 8 Int. Rev. Rec. 148; *Campbell v. Wilcox*, 10 Wall. 421; *Pugh v. McCormick*, 14 Wall. 361; *United States v. Isham*, 17 Wall. 496; *United States v. Smith*, 1 Sawyer, 192; *United States v. Learned*, 1 Abb. U. S. 483; *United States v. Brown, Deady*, 566; *Kinney v. Consolidated, &c. Min. Co.*, 4 Sawyer, 382.

For decisions of State courts on stamp laws of congress, see U. S. Dig. tit. *Internal Revenue*, sects. 22-63; also, *Davy v. Morgan*, 56 Barb. 218; *Coppernoll v. Ketcham*, ib. 111; *Griffin v. Ranney*, 35 Conn. 239; *Schermerhorn v. Burgess*, 55 Barb. 423, 38 How. Pr. 123; *Pacific Bank v. De Ro*, 37 Cal. 538; *Jones v. Jones*, 38 Cal. 584; *De Lorme v. Ferk*, 24 Wis. 201; *Kennedy v. Morrison*, 31 Tex. 207; *Tucker v. Potter*, 35 Conn. 43; *Miller v. Larmon*, 38 How. Pr. 417; *Werbiskie v. McManus*, 31 Tex. 116; *Black v. Nettles*, 25 Ark. 606; *Spear v. Alexander*, 42 Ala. 572; *Craig v. Dimock*, 47 Ill. 308; *Boston v. Nichols*, ib. 353; *Cross v. People*, ib. 152; *Whigham v. Pickett*, 43 Ala. 140; *Vaughan v. O'Brien*, 57 Barb. 491; 39 How. Pr. 515; *Sawyer v. Parker*, 57 Me. 39; *Hanford v. Obrecht*, 49 Ill. 146; *Clemens v. Conrad*, 19 Mich. 170; *Wilson v. McKenna*, 52 Ill. 43; *People v. Gates*, 43 N. Y. 40; *Sammons v. Halloway*, 21 Mich. 162; *D'Armond v. Dubose*, 22 La. Ann. 131; *Schultz v. Herndon*, 32 Tex. 390; *Stolte v. Herndon*, ib. 392; *Frazer v. Robinson*, 42 Miss. 121; *Cook v. Shearman*, 103 Mass. 21; *Berry v. Boyd*, 28 Iowa, 410; *Mercer v. Mercer*, 29 Iowa, 557; *Susong v. Williams*, 1 Heisk. 625; *Angier v. Smalley*, 58 Me. 425; *Van*

(a) 33 & 34 Vict. c. 97.

amends the provisions theretofore contained in various acts relating to stamp duties.

Interpretation of Terms. — By sect. 2, it is enacted that in the construction and for the purposes of this act the following words have the meanings by this section assigned to them, unless it is otherwise provided, or there be something in the context repugnant thereto: (1) "The Commissioners" means the Commissioners of Inland Revenue; (2) "Material" means and includes every sort of material upon which words or figures can be expressed; (3) "Write," "Written," or "Writing" includes every mode in which words or figures can be expressed upon material; (4) "Instrument" means and includes every written document; (5) "Stamp" means as well a stamp impressed by means of a die as an adhesive stamp; (6) "Stamped," with reference to instruments and material, applies as well to instruments and materials impressed with stamps by means of a die as to instru-

Wickle v. Poydras, 22 La. Ann. 70; *Rees v. Jackson*, 64 Pa. St. 486; *Hoops v. Atkins*, 41 Ga. 109; *Logan v. Dils*, 4 W. Va. 397; *Heitzell v. Gregory*, 7 Phila. 148; *Green v. Holway*, 101 Mass. 243; *Sporrer v. Eifer*, 1 Heisk. 633; *Jacobs v. Cunningham*, 32 Tex. 774; *Hale v. Wilkinson*, 21 Gratt. 75; *Jacobs v. Spofford*, 34 Tex. 152; *Hellman v. Bois*, 1 Cin. 30; *Atkins v. Plympton*, 44 Vt. 21; *Robinson v. Lair*, 31 Iowa, 9; *Bowker v. Goodwin*, 7 Nev. 135; *Taylor v. Duncan*, 33 Tex. 440; *Frink v. Thompson*, 4 Lans. 489; *Janvrin v. Fogg*, 49 N. H. 340; *Rheinstrom v. Cone*, 26 Wis. 163; *Brown v. Thompson*, 59 Me. 372; *Morris v. McMorris*, 44 Miss. 441; *Moore v. Moore*, 47 N. Y. 467; *Moore v. Quirk*, 105 Mass. 49; *Mogelin v. Westhoff*, 33 Tex. 788; *Glidden v. Higbee*, 31 Iowa, 379; *Union Agricultural, &c. Assoc. v. Neill*, ib. 95; *Waterbury v. McMillan*, 46 Miss. 635; *Duffy v. Hobson*, 40 Cal. 240; *Bumpan v. Faggart*, 26 Ark. 398; *Wallace v. Cravens*, 34 Ind. 534; *Davis v. Richardson*, 45 Miss. 499; *Dailey v. Coken*, 33 Tex. 815; *Mobile, &c. R. R. Co. v. Edwards*, 46 Ala. 267; *Corrie v. Billin*, 23 La. Ann. 250; *Byington v. Oaks*, 488; *Owsley v. Greenwood*, 18 Minn. 429; *Prather v. Zulauf*, 38 Ind. 155; *Cabbott v. Radford*, 17 Minn. 320; *Browne v. Bennett*, 24 La. Ann. 618; *Doffin v. Guyer*, 39 Ind. 215; *Corry Nat. Bank v. Rouse*, 3 Pittsb. 18; *Baker v. Baker*, 6 Lans. 509; *Timp v. Dockham*, 29 Wis. 440; *State v. Hile*, 30 Wis. 416; *Ricord v. Jones*, 33 Iowa, 26; *Bernard's Succession*, 24 La. Ann. 402; *Patterson v. Gile*, 1 Col. T. 200; *Grand v. Cox*, 24 La. Ann. 462; *Turner v. State*, 48 Ala. 549; *Forcheimer v. Holly*, 14 Fla. 239; *Works v. Hershey*, 35 Iowa, 340; *Morgan v. Graham*, ib. 213; *Black v. Woodrow*, 39 Md. 194; *Chartiers, &c. Turnp. Co. v. McNamara*, 72 Pa. St. 278; *Myers v. McGraw*, 5 W. Va. 30; *Kile v. Johnson*, 48 Ga. 189; *Foster v. Holley*, 49 Ala. 593; *Alter v. McDougal*, 26 La. Ann. 245; *Pargoud v. Richardson*, ib. 672; 30 La. Ann. Part II. 1286; *Emery v. Hobson*, 63 Me. 33; *Rowland v. Plummer*, 50 Ala. 182; *Reis v. Hellman*, 25 Ohio St. 180; *Perryman v. Greenville*, 51 Ala. 507; *Oxford Iron Co. v. Spradley*, ib. 171; *Chaffe v. Ludeling*, 27 La. Ann. 607; *Miller v. Wentworth*, 82 Pa. St. 280; *Stewart v. Hopkins*, 30 Ohio St. 502; *Garrish v. Hyman*, 29 La. Ann. 23; *Bibb v. Bonds*, 57 Ala. 509.

ments and materials having adhesive stamps affixed thereto; (7) "Executed" and "Execution," with reference to instruments not under seal, mean signed and signature; (8) "Money" includes all sums expressed in British or in any foreign or colonial currency; (9) "Stock" means and includes any share in any stocks or funds transferable at the Bank of England or at the Bank of Ireland, and India promissory notes, and any share in the stocks or funds of any foreign or colonial state or government, or in the capital stock or funded debt of any [* 1053] company, corporation, * or society in the United Kingdom, or of any foreign or colonial company, corporation, or society; (10) "Marketable security" means a security of such a description as to be capable of being sold in any stock-market in the United Kingdom; (11) "Person" includes company, corporation, and society; (12) "Steward" of a manor includes deputy steward.

Sect. 3 grants the duties specified in the schedule to the act.

By sect. 4, any instrument which by any act heretofore passed, and not relating to stamp duties, is specifically charged with the duty of 35s., shall, from and after the commencement of this act, be chargeable only with the duty of 10s. in lieu of the said duty of 35s.

Instruments relating to Crown Property. — By sect. 5, except where express provision to the contrary is made by this or any other act, an instrument relating to property belonging to the Crown, or being the private property of the sovereign, is to be charged with the same duty as an instrument of the same kind relating to property belonging to a subject.

By sect. 6, all stamp duties are to be paid according to the regulations of the act, and the schedule to the act.

How Instruments are to be written and stamped. — By sect. 7 (1), every instrument written upon stamped material is to be written in such manner, and every instrument partly or wholly written before being stamped, is to be so stamped, that the stamp may appear on the face of the instrument, and cannot be used for or applied to any other instrument written upon the same piece of material.

Instruments to be charged with more than One Duty.—By sect. 7 (2), if more than one instrument be written upon the same piece of material, every one of such instruments is to be separately and distinctly stamped with the duty with which it is chargeable. By sect. 8, except where express provision to the contrary is made by this or any other act: (1) an instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters; (2) an instrument made for any consideration or considerations in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration or considerations, is to be charged with duty in respect of such last-mentioned consideration or considerations as if it were a separate instrument made for such consideration or considerations only.

Several Deeds on One Sheet of Paper, Vellum, &c., made to answer several unconnected purposes, must bear a distinct stamp in respect of each; but if the contract, though effecting several * purposes, carries into effect only one [* 1054] entire transaction, one stamp only is required. Thus if a lease under seal also contains a covenant on the part of the lessor to sell the demised premises to the lessee, a deed stamp is not requisite in addition to the lease stamp, as the sale is ancillary to the lease; (b) but if the covenant embraces other and different premises, there must be a deed stamp in addition to the lease stamp. If a lease also contains a guarantee by a third party as surety for the payment of the rent, the guarantee is ancillary to the lease, and the lease stamp suffices; (c) but if the lease be under seal, and the guarantee refers to the payment of the price of goods and chattels covenanted to be bought and sold, or any matter not ordinarily or necessarily incident to the lease, there must be a deed stamp as well as a lease stamp. (d) If several leases are granted to different lessees, (e) or several surrenders of leases, (f) or several releases of separate causes of

(b) *Worthington v. Warrington*, 5 C. B. 635; 17 L. J. C. P. 117.

(c) *Price v. Thomas*, 2 B. & Ad. 218; *Pratt v. Thomas*, 4 C. & P. 554.

(d) *Wharton v. Walton*, 7 Q. B. 474; *Lovelock v. Franklyn*, 8 ib. 381.

(e) *Doe v. Day*, 13 East, 241.

(f) *Reg. v. Everden*, 16 L. J. Q. B. 18.

action, are made to different parties, (*g*) or several annuities are granted by one deed, engrossed on one piece of parchment, separate stamps are required; but if there be several leases of different properties to one lessee, (*h*) or a release of several causes of action against one releasee, or of one joint cause of action against several persons jointly liable, (*i*) or the grant of one annuity only, payable in different proportions to different individuals, (*k*) one stamp suffices. And if there are two deeds on the same piece of parchment or paper, the circumstance of one of them being unstamped will not prevent the other from being given in evidence if duly stamped. (*l*)

It has been held that several matters set forth and authenticated by one written document were so connected together as to form one contract and transaction, and to require only one stamp, in the following cases, — where a sale and mortgage were simultaneously agreed upon and carried into effect by one and the same deed; (*m*) where a bond and covenant to pay money, and also where a lease contained a power of attorney, and the deed and power in each case related to the same subject-matter; where a conveyance of land was coupled with a declaration of trust as to stock ancillary to such conveyance; (*n*) where a lease under seal also contained a covenant to insure; (*o*)

[* 1055] where a surety became bound * with his principal, and by the same bond the principal bound himself to indemnify the surety against loss; (*p*) where a transfer deed of shares also contained a covenant on the part of the purchaser to observe the rules of the company; (*q*) where indentures of apprenticeship divided a seven years' binding into two distinct periods, to be served with two different masters, and contained separate covenants with the several masters; (*r*) where a deed of surrender of a lease also contained a covenant on the part of the surrenderee to grant a new lease. (*s*)

(*g*) *Rex v. Weeks*, 2 Ld. Raym. 1445.

(*h*) *Blount v. Pearman*, 1 Sc. 55.

(*i*) *Perry v. Bouchier*, 4 Campb. 80.

(*k*) *Cook v. Jones*, 15 East, 243.

(*l*) *Anon.*, Salk. 162.

(*m*) *Rushbrook v. Hood*, 17 L. J. C. P.

58.

(*n*) *Doe v. Fereday*, 12 Ad. & E. 26, 27.

(*o*) *Wilson v. Smith*, 12 M. & W. 401.

(*p*) *Annandale v. Pattison*, 9 B. & C.

919.

(*q*) *Wolseley v. Cox*, 2 Q. B. 321.

(*r*) *Rex v. Louth*, 8 B. & C. 247.

(*s*) *Doe v. Phillips*, 11 Ad. & E. 796.

Agreements and leases on one sheet of paper must have both a lease and an agreement stamp, unless the agreement is strictly ancillary to the lease, and the two are necessarily connected together, and form part of one entire contract. (*t*) Where leasehold and copyhold premises were put up to auction in two separate lots, and the purchaser signed a memorandum agreeing to purchase the two lots at separate prices, it was held that two agreement stamps were necessary. (*u*) If an agreement for a lease also contains an agreement on the part of the intended lessor to give the lessee the option of purchasing the premises, separate agreement stamps are not necessary; but if the agreement to sell includes more premises than are comprised in the agreement for the lease, or relates to other and different premises, there are then two several contracts, and there must be two agreement stamps. (*x*) There may be a variety of stipulations and engagements entered into at the same time by divers parties, forming the several parts of one contract, together constituting one transaction, and requiring, consequently, but one stamp. (*y*) "When a debtor compounds with his creditors, and each creditor executes the same deed, covenanting either to give farther day of payment or to take a certain sum as a composition, every covenant is in fact a separate covenant, and the several deed of each creditor who signs the deed; but the whole being one transaction, a separate stamp is never required." (*z*) An agreement by several persons to subscribe to one common fund, or to do certain things in furtherance of one common purpose, requires but one stamp, although the parties may have several interests, and subject themselves to separate liabilities. (*a*) Where the members of a mutual insurance club all executed the same power of attorney, severally authorizing the * persons [* 1056] therein named to sign the club policies for them, it was

(*t*) *Wharton v. Walton*, 7 Q. B. 474. *Stead v. Liddard*, 8 Moore, 2; 1 Bing. 196.

(*u*) *Watling v. Horwood*, 12 Jur. 48.

(*x*) *Lovelock v. Frankland*, 8 Q. B. 379; 16 L. J. Q. B. 182; *Warrington v. Warrington*, 17 L. J. C. P. 117.

(*y*) *Rex v. Louth*, 8 B. & C. 247;

(*z*) *Mansfield, C. J.*, *Bowen v. Ashley*, 1 B. & P. N. R. 278; *Ramsbottom v. Davis*, 4 M. & W. 584.

(*a*) *Davis v. Williams*, 13 East, 232; *Goodson v. Forbes*, 6 Taunt. 171.

held that this was one transaction, and that the instrument required but one stamp. (b)

Appropriated Stamps. — By sect. 9 (1), a stamp which, by any word or words on the face of it, is appropriated to any particular description of instrument, is not to be used, or, if used, is not to be available, for any instrument of any other description. (2) An instrument falling under the particular description to which any stamp is so appropriated as aforesaid, is not to be deemed duly stamped, unless it is stamped with the stamp so appropriated.

Facts affecting Duty to be set forth. — By sect. 10, all the facts and circumstances affecting the liability of any instrument to *ad valorem* duty, or the amount of the *ad valorem* duty with which any instrument is chargeable, are to be fully and truly set forth in the instrument, under a penalty of £10.

Valuation of Foreign or Colonial Money. — By sect. 11, where an instrument is chargeable with *ad valorem* duty in respect of any money in any foreign or colonial currency, such duty shall be calculated on the value of such money in British currency, according to the current rate of exchange on the day of the date of the instrument.

Valuation of Stock and Marketable Securities. — By sect. 12, where an instrument is chargeable with *ad valorem* duty in respect of any stock or of any marketable security, (c) such duty shall be calculated on the value of such stock or security according to the average price thereof on the day of the date of the instrument.

Effect of Statement of Value. — By sect. 13, where an instrument contains a statement of current rate of exchange, or average price, as the case may require, and is stamped in accordance with such statement, it is, so far as regards the subject-matter of such statement, to be deemed duly stamped, unless, or until, it is shown that such statement is untrue, and that the instrument is in fact insufficiently stamped.

Denoting Stamp. — By sect. 14, where the duty with which an instrument is chargeable depends in any manner upon the duty paid upon another instrument, the payment of such last-men-

(b) *Allen v. Morrison*, 8 B. & C. 565.

(c) See, as to the meaning of these terms, sect. 2, *ante*, p. * 1052.

tioned duty shall, if application be made to the commissioners for that purpose, and on production of both the instruments, be denoted in such manner as the commissioners think fit upon such first-mentioned instrument.

Stamping Instruments after Execution. — By sect. 15

(1), *except where express provision to the contrary [*1057] is made by this or any other act, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of £10, and also by way of farther penalty, where the unpaid duty exceeds £10, of interest on such duty, at the rate of £5 per centum per annum, from the day upon which the instrument was first executed up to the time when such interest is equal in amount to the unpaid duty. And the payment of any penalty or penalties is to be denoted on the instrument by a particular stamp. (2) Provided as follows: (a) any unstamped or insufficiently stamped instrument, which has been first executed at any place out of the United Kingdom, may be stamped at any time within two months after it has been first received in the United Kingdom, on payment of the unpaid duty only; (b) the commissioners may, if they think fit, at any time within twelve months after the first execution of any instrument, remit the penalty or penalties, or any part thereof.

Reception in Evidence of Unstamped Instruments. — By sect. 16 (1), upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, the officer whose duty it is to read the instrument shall call the attention of the judge to any omission or insufficiency of the stamp thereon; and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the amount of the unpaid duty, and the penalty payable by law on stamping the same as aforesaid, and of a farther sum of £1, be received in evidence, saving all just exceptions on other grounds.

The section then directs the officer of the court to account for the duties and penalties, and provides for the denoting of the payment of the duty and penalty upon the instrument.

By sect. 17, save and except as aforesaid, no instrument exe-

cut in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

Sects. 18-21 provide for the mode to be pursued in order to procure the commissioners to express their opinion as to the duty, the effect of such a proceeding, and the mode of appealing from the commissioners' assessment.

Impressed Stamps. — By sect. 23, except where express [* 1058] provision is made to the contrary, all duties are to be denoted by impressed stamps only.

Cancellation of Adhesive Stamps. — By sect. 24 (1), an instrument, the duty upon which is required or permitted by law to be denoted by an adhesive stamp, is not to be deemed duly stamped with an adhesive stamp, unless the person required by law to cancel such adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, so that the stamp may be effectually cancelled, and rendered incapable of being used for any other instrument, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time. (2) Every person who, being required by law to cancel an adhesive stamp, wilfully neglects or refuses duly and effectually to do so in manner aforesaid, shall forfeit the sum of £10.

Sect. 25 imposes a penalty of £50 for frauds in relation to adhesive stamps and duties; sect. 26 provides for the recovery of penalties; sect. 27 for the making of affidavits and declarations in pursuance of the act; and sect. 28 for the recovery of money received by any person for the purpose of paying duty, and not so appropriated.

Of the Restamping of Altered Contracts. — If after a contract has been entered into and executed, the parties vary the terms thereof, either by an alteration in the body of the written instrument, or by an indorsement qualifying and restricting or

extending its operation, and neglect to have the writing restamped, they will be unable to recover upon either contract. (*d*) If the first agreement is altered and turned into another and different agreement, and the plaintiff brings his action thereon, and then finds that the substituted contract cannot be enforced by reason of its being unstamped, he cannot resort back to the contract which was abandoned by consent, and seek to recover upon it in its original state. If a bill of exchange or a promissory note is altered in any material particular, it becomes a new security, and must be restamped; (*e*) but whilst a contract is *in fieri*, and before it is completely executed by all parties, and perfected, an alteration may be made without rendering a new stamp necessary. (*f*) Before a promissory note has been negotiated, it may be converted into a bill of exchange, or altered as to its date, or the time that * it has to run, [* 1059] in furtherance of the original intention of all parties, and to correct a mistake. (*g*) And a subsequent alteration of a written agreement in a point not material, made by consent of all parties, does not render a fresh stamp necessary, such as an alteration made for the mere purpose of adding the style or address of the parties, or adding the words "or order" accidentally omitted on a bill of exchange; (*h*) or altering the name of the port whence the certificate of a ship's registry was granted, a wrong port having been inserted by mistake; (*i*) or rectifying a clerical error in the name, in declaring the interest on a policy; (*k*) or altering a place at which a bill is made payable, with the consent of the acceptor; (*l*) or inserting it when it has been accidentally omitted; or the insertion by the *bona fide* holder of a bill of his name in a blank left to be filled up by the name of the payee; for the issuing of the bill in blank conveys an implied authority to the holder to insert the name; and the

(*d*) *Reed v. Deere*, 7 B. & C. 265.

(*h*) *Byrom v. Thompson*, 11 Ad. & E.

(*e*) *Knill v. Williams*, 10 East, 431; 31; *Farquhar v. Southey*, Moo. & M. 14.

(*f*) *Jones v. Jones*, 1 C. & M. 721;

(*i*) *Cole v. Parkin*, 12 East, 471.

Spicer v. Burgess, 1 C. M. & R. 129;

(*k*) *Robinson v. Touray*, 1 M. & S.

Wright v. Inshaw, 1 Dowl. n. s. 802.

217; *Sawtell v. London*, 5 Taunt. 359.

(*g*) *Webber v. Maddocks*, 3 Campb.

(*l*) *Jacob v. Hart*, 6 M. & S. 142;

1; *Kennerley v. Nash*, 1 Stark. 452;

Walter v. Cubley, 2 Cr. & M. 151.

Downes v. Richardson, 5 B. & Ald. 674.

insertion thereof merely completes the contract, and carries into effect the original intention. (*m*)

If a bill of exchange or a promissory note, however, is altered in any material particular, it becomes a new security, and must be restamped. (*n*) This will be the case if the parties, by indorsement, agree to enlarge the time for the fulfilment of the contract, (*o*) or if a fresh signature is added at the bottom of a promissory note, after it has been negotiated, so as to make the note the joint note of two promisors instead of the note of one person only, or if the date has been altered. (*p*)

Of the Admissibility in Evidence for Collateral Purposes of Unstamped or Wrongly Stamped Documents. — An unstamped writing “may be given in evidence for the purpose of showing that it is a mere piece of waste paper, from the very circumstance of its being unstamped, or to serve some collateral purpose.” (*q*) An unstamped policy has been received in evidence to support an action for the penalties, (*r*) and an unstamped contract to prove a fraud, (*s*) and an unstamped guarantee [* 1060] to show that the *giving of it up was a sufficient consideration for a promise. (*t*) A memorandum on the back of an unstamped promissory note of the payment of a certain sum of money for interest has been allowed to be given in evidence as an admission of a certain principal sum being due. (*u*) Memoranda of payments, not given in evidence or sought to be set up as an acquittance or discharge of a debt, but in order to prove an over-payment, have been held admissible unstamped; (*x*) and although an unstamped receipt for money cannot be given

(*m*) *Cruchley v. Clarence*, 2 M. & S. 90. *Coppock v. Bower*, 4 M. & W. 361; *Williams v. Gerry*, 10 M. & W. 226; *Enthoven v. Hoyle*, 13 C. B. 394; *Matheson v. Ross*, 2 H. L. C. 300.

(*n*) *Knill v. Williams*, 10 East, 431; *Bathe v. Taylor*, 15 East, 416; *Tidmarsh v. Grover*, 1 M. & S. 735; *Walton v. Hastings*, 4 Campb. 223; *Cowie v. Halsall*, 4 B. & Ald. 197. (*r*) *Holland v. Duffin, Peake*, 81. (*s*) *Keable v. Payne*, 8 Ad. & E. 555; *Holmes v. Sixsmith*, 7 Exch. 802; 21 L. J. Ex. 313.

(*o*) *Bacon v. Simpson*, 3 M. & W. 78; *Stephens v. Lowe*, 2 M. & Sc. 44; 9 Bing. 32. (*t*) *Haigh v. Brooks*, 10 Ad. & E. 309.

(*p*) *Cardwell v. Martin*, 9 East, 190; *Bowman v. Nichol*, 5 T. R. 537; *Perring v. Hone*, 12 Moore, 145; 4 Bing. 28. (*u*) *Manly v. Peel*, 5 Esp. 121. (*x*) *Clarke v. Hougham*, 3 D. & R. 323.

(*q*) *Smart v. Nokes*, 7 Sc. N. R. 786;

in evidence as an acquittance or discharge of a debt, yet it may be looked at by a witness to refresh his memory upon the subject of the receipt of the money. (*y*)

When a stamped contract is in the hands of one of the parties to an action, who refuses to produce it, the court will allow secondary evidence of the contents to be given through the medium of an unstamped draft or copy; (*z*) and if a contract is proved to be in the hands of the defendant in an action, and the latter refuses to produce it after notice, the court will presume it to be duly stamped, unless the contrary be shown; (*a*) and the same presumption will be adopted where a contract has been lost. (*b*)

Stamp Duties on Contracts executed abroad.—Our courts of law do not, as previously mentioned, take notice of the revenue laws of foreign states. Where an action was brought in this country for the recovery of money lent in France, and unstamped receipts for the money were produced in proof of the loan, evidence to show that by the law of France such receipts required stamps to render them evidence was rejected. (*c*) But if the law of the country in which the contract is made renders the contract null and void if it is not stamped, it cannot be enforced here if it has not the foreign stamp. (*d*) Promissory notes made abroad and negotiated here are subjected to our stamp duties. (*e*)

(*y*) *Rambert v. Cohen*, 4 Esp. 213; *Pooley v. Goodwin*, 4 Ad. & E. 94; *Hart Catt v. Howard*, 3 Stark. 3; *Jacob v. v. Hart*, 11 L. J. Ch. 9; *Closmadeuc v. Lindsay*, 1 East, 460; *Maugham v. Carrel*, 18 C. B. 36; 35 L. J. C. P. 216. *Hubbard*, 8 B. & C. 14.

(*c*) *James v. Catherwood*, 3 D. & R.

(*z*) *Munn v. Godbold*, 11 Moore, 49; 190.

Braythwaite v. Hitchcock, 10 M. & W. 494.

(*d*) *Bristow v. Sequeville*, 5 Exch. 279.

(*a*) *Crisp v. Anderson*, 1 Stark. 35.

(*e*) *Post*, c. 2.

(*b*) *Rex v. Long Buckby*, 7 East, 45;

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* CHAPTER II.

OF THE STAMPS APPROPRIATE TO PARTICULAR CONTRACTS.

Stamp Duties on Deeds. — Deeds of any kind whatsoever which are not specifically charged in the schedule of the Stamp Act, 1870, are liable to a duty of 10s. (a) The mere fact of a contract having a seal placed against the signatures of the parties does not, as we have seen, make the contract a deed. A contract, therefore, does not require a deed stamp merely because there is a seal attached to it. (b) “The party who seeks to bring an instrument within the Stamp Act must show clearly that it falls within it; he must, so to speak, ‘hit the bird in the very eye.’ No intendments can be made in favor of the liability.” (c) If an old deed appears on the face of it to have been stamped, and the parchment is worn and the stamp obliterated, so that the nature and amount of it cannot be ascertained, the document is admissible in evidence; and it is for the parties who seek to impeach the deed to show, either that it was not stamped at all, or that it was stamped with a wrong stamp. (d)

Progressive Duty, according to the number of words contained in a deed, used to be imposed upon all deeds; but by the Stamp Act, 1870, the duties thereafter mentioned are granted, and there is no mention made of progressive duties, which are therefore abolished. (e)

(a) 33 & 34 Vict. c. 97, schedule, tit. *Deed*. By the Bankruptcy Act, 1869, sect. 113, every deed, &c., relating solely to property which is part of the estate of the bankrupt, and which, after the execution of such deed, &c., is, or remains, the estate of the bankrupt or of the trustee, and every power of attorney, &c., or other instrument relating solely to the property of any bankrupt or to

any proceeding under any bankruptcy, is exempted from stamp duty (except in respect of fees under that act).

(b) *Chanter v. Johnson*, 14 M. & W. 408; *Brown v. Vawser*, 4 East, 584.

(c) *Per Cur.*, *Phillips v. Morrison*, 13 L. J. Ex. 213.

(d) *Doe v. Coombs*, 3 Q. B. 687.

(e) See the preamble to the act.

Schedules, Inventories, or documents of any kind whatsoever referred to in or by, and intended to be used or given in evidence as part of, or as material to, any other instrument charged with stamp duty, and which are separate and distinct from, and not indorsed on, or annexed to, such other instrument, where such other instrument is chargeable with any duty not exceeding 10s., * are chargeable with the same duty as [* 1062] such other instrument, and in any other case with a duty of 10s. (*f*) Printed proposals published by any corporation or company respecting insurances, and referred to in or by any policy of insurance issued by such corporation or company, are exempted from this duty. (*g*) A public map, plan, survey, apportionment, allotment, award, or parochial or public document or writing made under, or in pursuance of, any act of parliament, and deposited or kept for reference in any registry or public office, or with the public books, papers, or writings of any parish, is not chargeable with this duty. (*f*) If a deed is sensible, and has a certain operation, it may, if properly stamped, itself be given in evidence, although it refers to an unstamped and unannexed schedule; for the contract cannot be excluded merely because it refers to inventories and catalogues which are not stamped. But if the deed is insensible and inoperative without the schedule, nothing can, of course, be made of it, unless the schedule itself is stamped and given in evidence. (*i*)

Attested Copies — Duplicates and Counterparts. — Attested or authenticated copies or extracts are charged with the same duty as the original instruments in the case of an instrument chargeable with any duty not amounting to 1s., and in any other case with a duty of 1s. (*k*) But copies or extracts of or from any law proceedings are exempt. With respect to copies and extracts, it is also enacted by sect. 79 of the Stamp Act, 1870, that an attested or otherwise authenticated copy or extract of or from (1) an instrument chargeable with any duty; (2) an original will, testament, or codicil; (3) the probate, or probate copy of a

(*f*) 33 & 34 Vict. c. 97, schedule, tit. *Schedule*.

(*g*) See schedule, tit. *Schedule exemptions*.

(*i*) *Dyer v. Green*, 1 Exch. 71; 16 L. J. Ex. 239; *Daines v. Heath*, 3 C. B.

945; 16 L. J. C. P. 117.

(*k*) See the schedule, tit. *Copy*.

will or codicil; (4) letters of administration or a confirmation of a testament, may be stamped at any time within fourteen days after the date of the attestation or authentication, on payment of the duty only without any penalty. Duplicates or counterparts of any instrument chargeable with stamp duty, not amounting to 5s., are subjected to the same duty as is charged on the original instrument; and in any other case, the stamp duty on the duplicate or counterpart is 5s.

By sect. 93, the duplicate or counterpart of an instrument chargeable with duty (except the counterpart of an instrument chargeable as a lease, such counterpart not being executed by or on behalf of any lessor or grantor) is not to be deemed duly stamped, unless it is stamped as an original instrument, or unless * it appears by some stamp impressed thereon that the full and proper duty has been paid upon the original instrument, of which it is the duplicate or counterpart.

Conveyances or Transfers on Sale of any property (except certain stocks) (1) are subject to the *ad valorem* duty specified in the schedule to the act, varying from 6d., where the value of the consideration does not exceed £5, to £1 10s. 6d., where the value exceeds £275; and for any conveyance or transfer of any kind not thereinbefore described, to a duty of 10s. By the Stamp Act, 1870, sect. 70, the term "conveyance on sale" includes every instrument, and every decree or order of any court, or of any commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser, or any other person on his behalf or by his direction.

By sect. 71 (1), where the consideration, or any part of the consideration, for a conveyance on sale consists of any stock or marketable security, such conveyance is to be charged with *ad valorem* duty in respect of the value of such stock or security; (2) where the consideration, or any part of the consideration for a conveyance on sale consists of any security not being a marketable security, such conveyance is to be charged with *ad valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon such security.

(1) See the schedule, tit. *Conveyance or transfer*.

By sect. 72 (1), where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period, so that the total amount to be paid can be previously ascertained, such conveyance is to be charged in respect of such consideration with *ad valorem* duty on such total amount; (2) where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically in perpetuity, or for any indefinite period not terminable with life, such conveyance is to be charged in respect of such consideration with *ad valorem* duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of such instrument; (3) where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically, (m) during any life or lives, such conveyance is to be charged, in respect of such consideration, with *ad valorem* duty on the amount which will or may, according to the terms of sale, *be payable dur- [* 1064] ing the period of twelve years next after the day of the date of such instrument; (4) provided that no conveyance on sale chargeable with *ad valorem* duty in respect of any periodical payments, and containing also provision for securing such periodical payments, is to be charged with any duty whatsoever in respect of such provision, and no separate instrument made in any such case for securing such periodical payments is to be charged with any higher duty than 10s.

By sect. 73, where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty.

(m) Where part of the consideration was to be paid by instalments of £1000 each at intervals of six months, it was held to be a periodical payment within this section, and not a deferred payment merely. *Limmer Asphalte Co. v. Commissioners of Inland Revenue*, L. R. 7 Ex. 211; 41 L. J. Ex. 106.

By sect. 74 (1), where any property has been contracted to be sold for one consideration for the whole, and is conveyed to the purchaser in separate parts or parcels by different instruments, the consideration is to be apportioned in such manner as the parties think fit, so that a distinct consideration for each separate part or parcel is set forth in the conveyance relating thereto, and such conveyance is to be charged with *ad valorem* duty in respect of such distinct consideration; (2) where property contracted to be purchased for one consideration for the whole by two or more persons jointly, or by any person for himself and others, or wholly for others, is conveyed in parts or parcels by separate instruments to the persons by or for whom the same was purchased for distinct parts of the consideration, the conveyance of each separate part or parcel is to be charged with *ad valorem* duty in respect of the distinct part of the consideration therein specified; (3) where a person having contracted for the purchase of any property, but not having obtained a conveyance thereof, contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser, the conveyance is to be charged with *ad valorem* duty in respect of the consideration for the sale by the original purchaser to the sub-purchaser; (4) where a person having contracted for the purchase of any property, but not having obtained a conveyance, contracts to sell the whole, or any part or parts thereof, to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts or parcels, the conveyance of each part or parcel is to be charged with *ad valorem* duty, in respect only of the consideration moving from the sub-purchaser thereof, without regard to the amount or value of the original [*1065] * consideration; (5) where a sub-purchaser takes an actual conveyance of the interest of the person immediately selling to him, which is chargeable with *ad valorem* duty in respect of the consideration moving from him, and is duly stamped accordingly, any conveyance to be afterward made to him of the same property by the original seller will be exempt from the said *ad valorem* duty, and chargeable only with the duty to which it may be liable under any general description,

but such last-mentioned duty shall not exceed the *ad valorem* duty.

By sect. 75, where, upon the sale of any annuity or other right not before in existence, such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments, if there be more than one, is to be charged with the same duty as an actual grant or conveyance, and is for all the purposes of this act to be deemed an instrument of conveyance or sale.

By sect. 76, where there are several instruments of conveyance for completing the purchaser's title to the property sold, the principal instrument of conveyance only is to be charged with *ad valorem* duty, and the other instruments are to be respectively charged with such other duty as they may be liable to, but such last-mentioned duty shall not exceed the *ad valorem* duty payable in respect of the principal instrument.

By sect. 77 (1), in the cases below specified, the principal instrument is to be ascertained in the following manner: (a) where any copyhold or customary estate is conveyed by a deed, no surrender being necessary, the deed is to be deemed the principal instrument; (b) in other cases of copyhold or customary estates, the surrender or grant, if made out of court, or the memorandum thereof, and the copy of court-roll of the surrender or grant, if made in court, shall be deemed the principal instrument; (c) where in Scotland there is a disposition or assignation executed by the seller, and any other instrument is executed for completing the title, the disposition or assignation is to be deemed the principal instrument; (2) in any other case the parties may determine for themselves which of several instruments is to be deemed the principal instrument, and may pay the *ad valorem* duty thereon accordingly.

By sect. 78, every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is chargeable with duty as a conveyance or transfer of property.

Provided that a conveyance or transfer made for [* 1066] effectuating * the appointment of a new trustee is not to be charged with any higher duty than 10s. (n)

Contracts not operating as Transfers and Conveyances of the legal estate in property are not liable to the *ad valorem* stamp, although they may operate upon the equitable estate. Agreements in writing, consequently, for the sale of land or veins or beds of coal, which do not transfer the land or the coal to the purchaser, by reason of their not having been made under seal, need only be stamped with a common agreement stamp. (o) A contract amounting to a purchase and sale of the goodwill of a business requires an *ad valorem* stamp as a conveyance; (p) and so do simple contracts operating as transfers of fixtures or growing crops, or of any description of property, not being simple contracts for the purchase and sale of goods and chattels. (q) Where by a marriage settlement the defendant, in consideration of a sum of money paid by the intended wife's father as a marriage portion, and also in consideration of the marriage, covenanted to pay an annuity to the plaintiff, to the use of the intended husband and wife, it was held that the transaction was not a purchase or a sale of an annuity within the language of the schedule to the 13 & 14 Vict. c. 97 (repealed), and that the *ad valorem* stamp was not requisite. (r) And where a person who was entitled to the reversion of stock after the death of the party entitled for life, agreed to pay the latter an annuity, in consideration of his permitting the stock to be sold and the proceeds of the sale to be received by such reversioner for his own benefit, it was held that the transaction was not a sale of an annuity in the ordinary acceptation of the term, and that the deed was properly stamped with a common deed stamp. (s) An indenture granting a license to carry on, with asphalte supplied by the licensor, the business of asphalte paving, &c., with a coven-

(n) The Stamp Act, 1870, schedule, tit. *Duplicate*.

(o) Phillips v. Morrison, 12 M. & W. 742; Rex v. Ridgwell, 6 B. & C. 665; Wilmot v. Wilkinson, ib. 511.

(p) Potter v. Commissioners, &c., 10 Exch. 147; 23 L. J. Ex. 345.

(q) Horsfall v. Key, 17 L. J. Ex. 266; Cattle v. Gamble, 5 Bing. N. C. 46; Att.-Gen. v. Brown, 3 Exch. 662.

(r) Massy v. Nanney, 3 Bing. N. C. 480.

(s) Blandy v. Herbert, 9 B. & C. 396.

ant to supply asphalte, was held not to require a conveyance stamp, no property, or any exclusive right to use the asphalte, being in fact conveyed by the indenture. (*t*)

Mortgages. (*u*) bonds, debentures, covenants, warrants of attorney to confess and enter up judgment, and foreign securities of any kind, are liable, when they are the only, or principal, or primary security for the payment or repayment of money not exceeding £300, to an *ad valorem* duty ranging from 8*d.* to * 7*s.* 6*d.*, and exceeding £300, to a duty of 2*s.* 6*d.* [* 1067] for every £100 or fractional part of £100. When they are the collateral, or auxiliary, or additional, or substituted security, or by way of farther assurance where the principal or primary security is duly stamped, they are liable to a duty of 6*d.* for every £100 or fractional part of £100.

Transfers, assignments, dispositions, or assignations of the above are in like manner liable to a stamp of 6*d.*; and where any farther money is added to the money already secured, the same amount of duty is payable as if for a principal security. (*x*) Reconveyances, releases, discharges, surrenders, resurrenders, warrants to vacate, or renunciations of any of the above securities, or of the benefit of them, or of the money thereby secured, are liable to a duty of 6*d.* upon every £100, or fractional part of £100. (*y*)

By the Stamp Act, 1870, sect. 105, the term "mortgage" means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be; and includes, — conditional surrender by way of mortgage, farther charge, wadset, and heritable bond, disposition, assignation, or tack in security, and eik to a reversion of or affecting any lands, estate, or property, real or personal,

(*t*) *Limmer Asphalte Co. v. Commissioners of Inland Revenue*, L. R. 7 Ex. 211; 41 L. J. Ex. 106.

(*u*) *Harris v. Birch*, 9 M. & W. 593.

(*x*) The Stamp Act, 1870, schedule, tit. *Mortgage*.

(*y*) See the schedule, tit. *Mortgage*.

heritable or movable, whatsoever; also any deed containing an obligation to infest any person in an annual rent, or in lands or other heritable subjects in Scotland, under a clause of reversion, but without any personal bond or obligation therein contained for payment of the money or stock intended to be secured; also any conveyance of any lands, estate, or property whatsoever in trust to be sold or otherwise converted into money, intended only as a security, and redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, except where such conveyance is made for the benefit of creditors generally, or for the benefit of creditors specified who accept the provision made for payment of their debts in full satisfaction thereof, or who exceed five in number; also any defeasance, letter of reversion, back bond, declaration, or other deed or writing for defeating or making redeemable or explaining or qualifying any conveyance, disposition, assignation, or tack, [* 1068] of any lands, estate, or property * whatsoever, apparently absolute, but intended only as a security; also an agreement, contract, or bond accompanied with a deposit of title-deeds for making a mortgage, wadset, or any such other security or conveyance as aforesaid, of any lands, estate, or property comprised in such title-deeds, or for pledging or charging the same as a security.

By sect. 106, a security for the transfer or retransfer of any stock is to be charged with the same duty as a similar security for a sum of money equal in amount to the value of such stock; and a transfer, assignment, disposition, or assignation of any such security, and a reconveyance, release, discharge, surrender, re-surrender, warrant to vacate, or renunciation of any such security, shall be charged with the same duty as an instrument of the same description relating to a sum of money equal in amount to the value of such stock.

By sect. 107 (1), a security for the payment or repayment of money to be lent, advanced, or paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited. (2) Where such

total amount is unlimited, the security is to be available for such an amount only as the *ad valorem* duty impressed thereon extends to cover. (3) Provided that no money to be advanced for the insurance of any property comprised in any such security against damage by fire, or for keeping up any policy of life insurance comprised in such security, or for effecting in lieu thereof any new policy, or for the renewal of any grant or lease of any property comprised in such security upon the dropping of any life whereon such property is held, shall be reckoned as forming part of the amount in respect whereof the security is chargeable with *ad valorem* duty.

By sect. 108, a security for the payment of any rent-charge, annuity, or periodical payments, by way of repayment, or in satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged, is to be charged with the same duty as a similar security for the payment of the sum of money so lent, advanced, or paid.

By sect. 109, no transfer of a duly stamped security, and no security by way of farther charge for money or stock, added to money or stock previously secured by a duly stamped instrument, is to be charged with any duty by reason of containing any farther or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, proviso, power, stipulation, or agreement in * relation thereto, or any farther assur- [* 1069] ance of the property comprised in the transferred or previous security.

By sect. 110 (1), where any copyhold or customary lands or hereditaments are mortgaged alone by means of a conditional surrender or grant, the *ad valorem* duty is to be charged on the surrender or grant, if made out of court, or the memorandum thereof, and on the copy of court roll of the surrender or grant, if made in court. (2) Where any copyhold or customary lands or hereditaments are mortgaged, together with other property, for securing the same money or the same stock, the *ad valorem* duty is to be charged on the instrument relating to the other property, and the surrender or grant, or the memorandum thereof, or the copy of court-roll of the surrender or grant, as the case

may be, is to be charged with duty as if the surrender or grant were not made upon a mortgage, but such last-mentioned duty shall not exceed the said *ad valorem* duty.

By sect. 111, an instrument chargeable with *ad valorem* duty as a mortgage is not to be charged with any other duty by reason of the equity of redemption in the mortgaged property being thereby conveyed or limited in any other manner than to, or in trust for, or according to the direction of, a purchaser.

By sect. 112, the exemption from stamp duty conferred by 6 & 7 W. 4, c. 32, for the regulation of benefit building societies, shall not extend to any mortgage to be made after the passing of this act, except a mortgage by a member of a benefit building society for securing the repayment to the society of money not exceeding £500.

Sections 113 and 114 are repealed by the 34 Vict. c. 4, and in lieu thereof it is enacted by sect. 2 of that act that the term "foreign security" means and includes every security for money by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company, bearing date or signed after the 3d day of June, 1862 (except an instrument chargeable with duty as a bill of exchange or promissory note), (1) which is made or issued in the United Kingdom, or (2) which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom.

By sect. 3, every person who in the United Kingdom makes, issues, assigns, transfers, or negotiates any foreign security not being duly stamped, shall forfeit the sum of £20.

By the Stamp Act, 1870, sect. 115, the commissioners may at any time, without reference to the date thereof, allow any foreign security to be stamped without the payment of any penalty, upon being satisfied, in any manner that they may think proper, that it was not made or issued, and has not been transferred, assigned, * or negotiated within the United Kingdom, and that no interest has been paid thereon in the United Kingdom.

By the 34 Vict. c. 4, sect. 5, it is enacted that, in lieu of the stamp duty now payable under "The Stamp Act, 1870," there shall be charged upon — Mortgage of any stock or marketable

security, for every £5000, and also for any fractional part of £5000 of the amount secured, 10s. And no release or discharge of any such mortgage shall be chargeable with any *ad valorem* duty.

A deed of assignment of goods and chattels as an additional security for the payment of a principal sum and interest thereon, already secured by a warrant of attorney, was held to be sufficiently stamped with a common deed stamp; (z) and so also was a deed executed and indorsed on a former mortgage deed, as a farther security for the sum thereby secured, (a) or a declaration of trust of a surrender of copyholds by way of security. (b) A security for contingent future payments is as much within the words and meaning of the statute as a security for certain future payments. (c)

Covenants. — Any separate deed of covenant (not being an instrument chargeable with *ad valorem* duty as a conveyance on sale or mortgage) made on the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of or the title to the property sold or mortgaged, or to the production of the muniments of title relating thereto, or to all or any of the matters aforesaid, is liable to a duty equal to the amount of the *ad valorem* duty payable in respect of the consideration or mortgage money, where that does not exceed 10s., and in any other case 10s.

Exchanges, Partitions, &c. — By the Stamp Act, 1870, sect. 94, where, upon the exchange of any real or heritable property, for any other real or heritable property, or upon the partition or division of any real or heritable property, any consideration exceeding in amount or value £100 is paid or given, or agreed to be paid or given, for equality, the principal or only instrument whereby such exchange or partition or division is effected is to be charged with the same *ad valorem* duty as a conveyance on sale for such consideration, and with such duty only; and where in any such case there are several instruments for com-

(z) *Pierpoint v. Gower*, 5 Sc. N. R. 605.

(b) *Haywood v. Bibby*, 11 M. & W. 812.

(a) *Robinson v. Macdonnell*, 5 M. & S. 234.

(c) *Ld. Canning v. Raper*, 22 L. J. Q. B. 87.

pleting the title of either party, the principal instrument is to be ascertained, and the other instruments are to be charged with duty according to the provisions of the 76th and 77th sections of this act.

[* 1071] * In any other case, the instrument effecting the exchange is liable to a duty of 10s. (*d*)

Settlements. — Any instrument, whether voluntary or upon any good or valuable consideration, other than a *bona fide* pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever, is liable, for every £100, and also for any fractional part of £100, of the amount or value of the property settled or agreed to be settled, to a duty of 5s.

Instruments of appointment relating to any property in favor of persons specially named or described as the objects of a power of appointment, created by a previous settlement stamped with *ad valorem* duty in respect of the same property, or by will, where probate duty has been paid in respect of the same property as personal estate of the testator, are exempted from duty.

By the Stamp Act, 1870, sect. 124, where any money which may become due or payable upon any policy of insurance, or upon any security not being a marketable security, is settled or agreed to be settled, the instrument whereby such settlement is made or agreed to be made, is to be charged with *ad valorem* duty in respect of such money. Provided as follows: (1) Where, in the case of a policy of insurance, no provision is made for keeping up the policy, the *ad valorem* duty is to be charged only on the value of the policy at the date of the instrument: (2) If in any such case the instrument contains a statement of such value, and is stamped in accordance with such statement, it is, so far as regards such policy, to be deemed duly stamped, unless or until it is shown that such statement is untrue, and that the instrument is in fact insufficiently stamped.

(*d*) See the schedule, tit. *Exchanges*.

By sect. 125 (1), an instrument chargeable with *ad valorem* duty as a settlement in respect of any money, stock, or security, is not to be charged with any farther duty by reason of containing provision for the payment or transfer of the same money, stock, or security. (2) Where any money, stock, or security is settled or agreed to be settled by a person who has only a reversionary interest therein, and the instrument whereby such settlement is made or agreed to be made contains a covenant by the person entitled in possession to the interest or dividends of such money, stock, or security for the payment, during the continuance of such *possession, of any annuity or [* 1072] yearly sum not exceeding interest at the rate of £4 per centum per annum upon the amount or value of such money, stock, or security, such instrument shall not be charged with any duty in respect of such covenant.

By sect. 126 (1), where several instruments are executed for effecting the settlement of the same property, and the *ad valorem* duty chargeable in respect of the settlement of such property exceeds 10s., one only of such instruments is to be charged with the *ad valorem* duty. (2) Where a settlement is made in pursuance of any previous agreement, or articles upon which any *ad valorem* settlement duty exceeding 10s. has been paid in respect of the same property, such settlement is not to be charged with any *ad valorem* settlement duty. (3) In each of the aforesaid cases, the instruments not chargeable with *ad valorem* duty are to be charged with the duty of 10s.

Revocations of uses and trusts of any property by deed or by any writing not being a will, are liable to a duty of 10s. (e)

Releases or Renunciations of any property, or of any right or interest in any property, in any other case except upon a sale or by way of security, are liable to a duty of 10s. (f).

A Lease or tack for any definite term *less than a year* of any dwelling-house or tenement, or part, at a rent not exceeding £10 per annum, is liable to a duty of 1*d.*; and of a furnished house or apartments where the rent exceeds £25, to a duty of 2*s.* 6*d.*; and for any other lands, tenements, or heritable subjects, the same duty as a lease for a year at the rent reserved. A lease or

(e) Schedule, tit. *Revocation*.

(f) Schedule, tit. *Release*.

tack for any other definite term, or for any indefinite term, of any lands, tenements, or heritable subjects, where the consideration consists of money, stock, or security, requires the same duty as a conveyance on a sale for the same consideration; and where the consideration is a rent at a rate or average rate not exceeding £5 up to £100, it is liable to a duty varying according to the rate of the rent, and according to the duration of the term, whether it is more or less than thirty-five years or one hundred years.

A lease or tack of any other kind whatsoever is liable to a duty of 10s.

By the Stamp Act, 1870, sect. 96 (1), an agreement for a lease or tack, or with respect to the letting of any lands, tenements, or heritable subjects, for any term not exceeding thirty-five years, is to be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement. (2) A lease or tack made subsequently to, and in conformity with, such an agreement duly stamped, is to be charged with the duty of 6d. only.

[* 1073] * By sect. 97 (1), where the consideration, or any part of the consideration, for which any lease or tack is granted or agreed to be granted, does not consist of money, but consists of any produce or other goods, the value of such produce or goods is to be deemed a consideration in respect of which the lease or tack or agreement is chargeable with *ad valorem* duty; and where it is stipulated that the value of such produce or goods is to amount at least to, or is not to exceed, a given sum, or where the lessee is specially charged with, or has the option of paying after, any permanent rate of conversion, the value of such produce or goods is, for the purpose of assessing the *ad valorem* duty, to be estimated at such given sum or according to such permanent rate. (2) A lease or tack or agreement, made either entirely or partially for any such consideration, if it contains a statement of the value of such consideration, and is stamped in accordance with such statement, is, so far as regards the subject-matter of such statement, to be deemed duly stamped, unless or until it is otherwise shown that such statement is incorrect, and that it is in fact not duly stamped.

By sect. 98 (1), a lease or tack or agreement for a lease or tack, or with respect to any letting, is not to be charged with any duty in respect of any penal rent, or increased rent in the nature of a penal rent, thereby reserved or agreed to be reserved or made payable, or by reason of being made in consideration of the surrender or abandonment of any existing lease, tack, or agreement of or relating to the same subject-matter. (2) No lease made for any consideration or considerations in respect whereof it is chargeable with *ad valorem* duty, and in farther consideration either of a covenant by the lessee to make, or of his having previously made any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is to be charged with any duty in respect of such farther consideration. (3) No lease for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, and no lease for a term absolute not exceeding twenty-one years, granted by an ecclesiastical corporation aggregate or sole, is to be charged with any higher duty than 35s. (4) No lease for a definite term exceeding thirty-five years granted under the Trinity College (Dublin) Leasing and Perpetuity Act, 1851, is to be charged with any higher duty than would have been chargeable thereon if it had been a lease for a definite term not exceeding thirty-five years. (5) No lease or tack, or agreement for a lease or tack, in Scotland, of any dwelling-house or tenement, or part of a dwelling-house or tenement, for any definite * term not exceeding a year, at a rent not exceeding [*1074] the rate of £10 per annum, is to be charged with any higher duty than 1*d.*

By sect. 99, the duty upon an instrument chargeable with duty as a lease or tack for any definite term less than a year of —(1) any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding the rate of £10 per annum; (2) any furnished dwelling-house or apartments; or upon the duplicate or counterpart of any such instrument, may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is first executed.

By sect. 100 (1), every person who executes, or prepares, or is

employed in preparing, any instrument upon which the duty may, under the provisions of the last preceding section, be denoted by an adhesive stamp, and which is not, at or before the execution thereof, duly stamped, shall forfeit the sum of £5. (2) Provided that nothing in this section contained shall render any person liable to the said penalty of £5 in respect of any letters or correspondence.

Where the expenditure of money in improvements constitutes the consideration for the lease, it is not a lease by way of fine or premium within the meaning of the former statutes. (g) The granting of a lease in consideration of a premium is a sale of an interest in the land for a term of years; and the premium must be "truly expressed and set forth in words at length" in the deed. (h) By the 39 Vict. c. 16, a lease by which the rent reserved by another lease duly stamped is increased, is only to be stamped for the additional rent. (i)

A Contract for the Sale of Vesture and Herbage and Growing Grass for a certain sum, is properly stamped as a lease granted in consideration of a sum of money by way of fine or premium. (k)

Every contract which operates as a demise of realty for any determinate term, is in contemplation of law a lease. (l) A mere acknowledgment of an antecedent tenancy, or of an existing tenancy, does not require a lease stamp. (m) A lease for a term of forty-five years at a substantial rent for the first twenty-three years, and at a peppercorn rent during the remaining twenty-two years, is not a lease exceeding thirty-five years at a yearly rent. (n)

[* 1075] ***Agreements for Leases** are charged with the same duty as leases. (o)

Assignments and Surrenders of Leases — Agreements to surrender. — Every assignment of a lease made upon any other

(g) *Nicholls v. Cross*, 14 M. & W. 42.

(h) *Doe v. Lewis*, 10 B. & C. 675.

(i) Sect. 11.

(k) *Cattell v. Gamble*, 6 Sc. 737; 5 Bing. N. C. 46.

(l) *Burton v. Revell*, 16 L. J. Ex. 86; 16 M. & W. 311.

(m) *Eagleton v. Gutteridge*, 11 M. &

W. 465; *Glen v. Dungey*, 4 Exch. 61; *Doe v. Wiggins*, 4 Q. B. 375.

(n) *Pearson v. The Commissioners of Inland Revenue*, L. R. 3 Ex. 242; 37 L. J. Ex. 171.

(o) See sect. 96, *ante*, p. * 1072.

occasion than a sale or mortgage is subjected to duty as a conveyance. (*p*) Every surrender not being of copyholds and not chargeable with duty as a conveyance on sale or mortgage is chargeable with a duty of 10s. (*q*)

Surrender of Copyholds. — A surrender or grant made out of court, or the memorandum thereof, or the copy of the court-roll of any surrender or grant made in court, is liable to a duty of 10s.

By the Stamp Act, 1870, sect. 81, (1) the copy of court-roll of a surrender or grant made out of court shall not be admissible or available as evidence of the surrender or grant, unless the surrender or grant, or the memorandum thereof, is duly stamped, of which fact the certificate of the steward of the manor on the face of such copy shall be sufficient evidence; (2) the entry upon the court-rolls of a surrender or grant shall not be admissible or available as evidence of the surrender or grant, unless the surrender or grant, if made out of court, or the memorandum thereof, or the copy of court-roll of the surrender or grant, if made in court, is duly stamped, of which fact the certificate of the steward of the manor in the margin of such entry shall be sufficient evidence.

By sect. 82, no instrument is to be charged more than once with duty by reason of relating to several distinct tenements, in respect whereof, several fines or fees are due to the lord or steward of the manor.

By sect. 83, (1) all the facts and circumstances affecting the liability to *ad valorem* duty of the copy of court-roll of any surrender or grant made in court, or the amount of *ad valorem* duty with which any such copy of court-roll is chargeable, are to be fully and truly stated in a note to be delivered to the steward of the manor before the surrender or grant is made; (2) every person who, with intent to defraud her Majesty, her heirs or successors, — (*a*) makes in court any surrender before such a note as aforesaid has been delivered to the steward of the manor; (*b*) being employed or concerned in or about the preparation of any such

(*p*) See sect. 78, *ante*, p. * 1065; and see the duties chargeable on conveyances, *ante*, p. * 1063. (*q*) See the schedule, tit. *Surrender*.

note as aforesaid, neglects or omits fully and truly to state therein all the above-mentioned facts and circumstances, — shall forfeit the sum of £50.

By sect. 84, the steward of every manor shall refuse, [*1076] — (1) to *accept in court any surrender, or to make in court any grant, until such a note as is required by the last preceding section has been delivered to him; (2) to enter on the court-rolls, or accept any presentment of, or admit any person to be tenant under or by virtue of, any surrender or grant made out of court, or any deed which is not duly stamped; and in any case in which he does not so refuse, shall forfeit the sum of £50.

By sect. 85, the steward of every manor shall, within four months from the day on which any surrender or grant is made in court, make out a duly stamped copy of court-roll of such surrender or grant, and have the same ready for delivery to the person entitled thereto, and if he neglects so to do, shall forfeit the sum of £50; and the duty payable in respect of such copy of court-roll shall be a debt to her Majesty, her heirs or successors, from such steward, whether he shall have received it or not, and shall be recoverable by the summary means provided for the recovery of duties received and not applied; and if he has not received the duty, the same shall also be a debt to her Majesty, her heirs or successors, from the party entitled to such copy, and recoverable from him in manner aforesaid.

By sect. 86, the steward of any manor may, before he accepts in court any surrender or makes in court any grant, demand and insist on the payment of his lawful fees in relation to the surrender or grant, together with the duty payable on the copy of court-roll thereof, and may refuse to proceed in any such matter or to deliver such copy of court-roll to any person, until such fees and duty are paid.

Every agreement which operates as a surrender must be stamped as a surrender. (r)

Contracts of Apprenticeship. — Instruments of apprenticeship, where there is no premium or consideration, are liable to a duty of 2s. 6d., and in every other case are liable to a duty of 5s.

(r) *Williams v. Sawyer*, 6 Moore, 226.

for every £5, or fractional part of £5, of the premium or consideration. (*s*)

By the Stamp Act, 1870, sect. 39, every writing relating to the service or tuition of any apprentice, clerk, or servant placed with any master to learn any profession, trade, or employment (except articles of clerkship to attorneys and others specifically charged with duty) is to be deemed an instrument of apprenticeship.

By sect. 40, the full sum of money, and the value of any other matter or thing paid, given, or assigned, or secured to be paid, given, or assigned, to or for the benefit of the master with or in * respect of any apprentice, clerk, or servant [*1077] (not being a person bound to serve in order to admission in any court), is to be fully and truly set forth in an instrument of apprenticeship; and if any such sum, or other matter or thing be paid, given, assigned, or secured as aforesaid, and no such instrument be made, or if any such instrument be made, and such sum, or the value of such other matter or thing, be not set forth therein as aforesaid, the master, and also the apprentice himself, if of full age, and any other person being a party to the contract, or by whom any such sum, or other matter or thing, is paid, given, assigned, or secured, shall forfeit the sum of £20, and the contract, and the instrument (if any) containing the same, shall be null and void. But all instruments relating to poor children apprenticed at the sole charge of any parish, township, or public charity, or pursuant to any act for regulating parish apprentices, are exempted from duty: (*t*) and so are indentures of parish apprentices and voluntary apprenticeship to the sea service, and all counterparts and assignments thereof; and so are certain instruments of apprenticeship in Ireland. (*u*) The following exemption from duty is contained in the general exemptions at the end of the schedule of the Stamp Act, 1870:— Instruments of apprenticeship, bonds, contracts, and agreements entered into in the United Kingdom for or relating to the service in any of her Majesty's colonies or possessions abroad of any

(*s*) See schedule, tit. *Apprenticeship*. Rex v. Halesworth, 3 B. & Ad. 717; R. v. Skeffington, 3 B. & Ald. 382.

(*t*) As to what is a public charity, see (*u*) See schedule, *Apprenticeship*.

person as an artificer, clerk, domestic servant, handicraftsman, mechanic, gardener, servant in husbandry, or laborer.

If the contract is only a contract of hiring and service, it must be stamped with an agreement stamp, unless it is under seal and requires a deed stamp, or unless it is a contract "for the hire of laborers, artificers, manufacturers, or menial servants," and as such exempt from all stamp duty. (x) In calculating the amount of the duty, regard must be had only to the value of what is given, directly or indirectly, to the master as consideration for the taking of the apprentice. If the friends of the latter covenant to provide meat, lodging, and clothing, this is not a benefit rendered to the master, nor anything given to him, but to the apprentice himself, and it cannot be made the subject of stamp duty under the act; (y) nor can a reservation to the master of a portion of the apprentice's earnings, the master being otherwise entitled to the whole. (z) But if any friends of the apprentice make a secret

bargain with the master, to give him some consideration beyond * what is expressed upon the face of the deed of apprenticeship, the contract is void. (a) Money promised or agreed to be paid by a person not competent to contract or to make a valid payment, amounts to nothing, and will not invalidate the deed; (b) nor will the insertion therein of a greater sum than was actually paid. (c)

Charter-Parties, or any agreement or contract for the charter of any ship or vessel, or any memorandum, letter, or other writing, between the captain, master, or owner of any ship or vessel, and any other person, for or relating to the freight or conveyance of any money, goods, or effects on board of such ship or vessel, are subjected to a stamp duty of 6d. (d)

By the Stamp Act, 1870, sect. 66, the duty upon an instrument chargeable with duty as a charter-party may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is last executed, or by whose execution it is completed as a binding contract.

(x) See *post*, p. * 1079.

(y) *Rex v. St. Petrox*, 4 T. R. 196;
R. v. Aylesbury, 3 B. & Ald. 569.

(z) *Rex v. Bradford*, 1 M. & S. 151.

(a) *Rex v. Amersham*, 4 Ad. & E. 508.

(b) *Rex v. Bourton*, 9 B. & C. 872.

(c) *Rex v. Keynsham*, 5 East, 309.

(d) Schedule, tit. *Charter-party*.

By sect. 67, where any document chargeable with duty as a charter-party, and not being duly stamped, is first executed out of the United Kingdom, any party thereto may, within ten days after it has been first received in the United Kingdom, and before it has been executed by any person in the United Kingdom, affix thereto an adhesive stamp denoting the duty chargeable thereon, and at the same time cancel such adhesive stamp, and the instrument with an adhesive stamp thereon so affixed and cancelled shall be deemed duly stamped.

By sect. 68, an executed instrument chargeable with duty as a charter-party, and not being duly stamped, may be stamped with an impressed stamp upon the following terms, — that is to say, (1) within seven days after the first execution thereof, on payment of the duty and a penalty of 4s. 6d.; (2) after seven days, but within one month after the first execution thereof, on payment of the duty and a penalty of £10; and shall not in any other case be stamped with an impressed stamp.

A guarantee for the due performance of a charter-party does not require to be stamped as a charter-party. (e)

Transfers of Ships. — Instruments for the sale, transfer, or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel, are exempted from duty. (f)

* **Agreements.** — Any agreement or memorandum of [* 1079] agreement made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract or obligatory upon the parties from its being a written instrument, is liable to a duty of 6d. (g)

Although a writing may not be evidence of the whole contract, yet if it is evidence of a material part of it, and a necessary part in the proof of the contract, it requires a stamp. (h)

Exemptions. — The above provision with respect to agree-

(e) *Rein v. Lane*, L. R. 2 Q. B. 144;
36 L. J. Q. B. 81.

(f) See the general exemptions at
the end of the schedule.

(g) Schedule, tit. *Agreement*.

(h) *Ramsbottom v. Mortley*, 2 M. &
S. 445; *Glover v. Hackett*, 26 L. J. Ex.
416.

ments is subject to the following exemptions: (1) Agreement or memorandum, the matter whereof is not of the value of 5*l*. (2) Agreement or memorandum for the hire of any laborer, artificer, manufacturer, or menial servant. (3) Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise. (4) Agreement or memorandum made between the master and mariners of any ship or vessel for wages on any voyage coastwise from port to port in the United Kingdom.

Firemen and stokers employed on board merchant vessels worked by steam, and placed under the orders of the engineer, are to be considered as artificers and laborers, and not seamen; and contracts for the hiring and service of such persons, so to be employed, are exempt from stamp duty. (i) All agreements between the master and seamen of any ship, if made in the form sanctioned by the Board of Trade, are exempt from stamp duty. (k)

By sect. 36, the duty of 6*d*. upon an agreement may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed.

Exemption of Agreements relating to the Sale of Goods and Chattels. — A written agreement by a debtor to sell and deliver goods, and by a creditor to receive them, in satisfaction and discharge of an existing debt, is an agreement "for or relating to the sale of chattels" within the exemption of the Stamp Act. (l) But a contract under seal for the sale and purchase of goods and chattels is not exempt from the stamp duty on deeds. If the parties to a contract of purchase and sale choose to resort to a solemn and formal contract under seal, such contract, if executory, must be stamped with a deed stamp; and if it operates as an immediate transfer of the thing sold to the purchaser, it must have an *ad valorem* conveyance stamp before it can be [* 1080] given * in evidence in any court of justice. (m) *Fructus industriales*, such as growing crops of turnips, pota-

(i) *Wilson v. Zulueta*, 19 L. J. Q. B. 49.

(l) *Chatfield v. Cox*, 18 Q. B. 321; 21 L. J. Q. B. 279.

(k) 17 & 18 Vict. c. 104, sect. 9.

(m) *Clayton v. Burtenshaw*, 5 B. & C. 47; 7 D. & R. 80.

toes, and corn, being considered, as previously mentioned, goods and chattels (*ante*, p. * 163), are within the exemption of the statute; and simple contracts as to them need not, consequently, be stamped to be admissible in evidence. A contract with a water company for the supply of water is a contract for "the sale of goods, wares, and merchandise" within the exemption, and does not, consequently, require a stamp; and it is immaterial whether the subject-matter of the sale exists at the time of the making of the contract, or whether it has afterward to be made, manufactured, or provided. (*n*) An agreement to make a complicated machine with wheels and springs, according to a certain specification, is an agreement relating to the sale of goods within the exemption, unless the contract provides for the erection of it in a dwelling-house, or upon the soil and freehold as a fixture, in which case it is a contract for the performance of work and labor and the supply of materials, and not a contract of sale. (*o*) An agreement for the sale and purchase of a ship comes within the exemption, as being a contract relating to the sale of goods and chattels; (*p*) and the transfer of the ship itself is expressly exempted from all stamp duty. A memorandum relating to the sale of goods, such as a bill of parcels, is admissible in evidence to establish a sale, and show who was the purchaser of the goods, although it has an unstamped receipt at the bottom of it. (*q*) An agreement to participate in the profit and loss of a fishing adventure, or to take a share in the outfit of a ship, is not an agreement for the sale of goods, and is not, consequently, within the exemption; (*r*) but an agreement to take a share of certain goods purchased, and participate in the profit and loss of a resale, is an agreement relating to the sale of goods within the exemption. (*s*)

An agreement relating to the sale of goods comes within the exemption, notwithstanding the introduction into it of collateral matter. (*t*) An agreement to cancel a bargain for the purchase

(*n*) *West Mid. Water Co. v. Sewerkrop*, M. & M. 408; *Gurr v. Scudds*, 11 Exch. 190.

(*o*) *Pinner v. Arnold*, 2 Cr. M. & R. 616.

(*p*) *Meering v. Duke*, 2 M. & R. 121.

(*q*) *Millen v. Dent*, 16 L. J. Q. B. 374.

(*r*) *Leigh v. Banner*, 1 Esp. 403.

(*s*) *Venning v. Leckie*, 13 East, 7.

(*t*) *Tooke v. Meering*, Dans. & L. 35.

any false statement with reference either to the nature of the transaction or the value of the goods, wares, or merchandise, shall forfeit the sum of £20; (2) but no delivery order is, by reason of the same being unstamped, to be deemed invalid in the hands of the person having the custody of, or delivering out, the goods, wares, or merchandise therein mentioned, unless such person is proved to have been party or privy to some fraud on the revenue in relation thereto.

The duty, in the absence of any agreement to the contrary, was to be paid by the person requiring the order; and the person of whom it was required might refuse to give the order until the amount of the duty was paid to him. (*h*)

Warrants for Goods are liable to a duty of 3*d.* (*i*) Any document or writing given by any inland carrier acknowledging the receipt of goods conveyed by such carrier, or a weight note issued together with a duly stamped warrant, and relating solely to the same goods, is exempted from duty.

By the Stamp Act, 1870, sect. 88, the term "warrant for goods" means any document or writing, being evidence of the title of any person therein named, or his assigns, or the holder thereof, to the property in any goods, wares, or merchandise lying in any warehouse or dock, or upon any wharf, and signed or certified by or on behalf of the person having the custody of such goods, wares, or merchandise. (*k*)

By sect. 92, every person who makes, executes, or issues, or receives or takes by way of security or indemnity, any warrant for goods not being duly stamped, shall forfeit the sum of £20.

Contract Notes for the Sale and Purchase of Stock or Shares.—Every note, memorandum, or writing relating to the sale or purchase of any stocks, funds, or marketable securities (*l*) of the value of £5 or upwards, is charged with the duty of 1*d.* (*m*);

(*h*) 23 & 24 Vict. c. 111, sects. 13 and 14. Repealed; see 33 & 34 Vict. c. 99. mortgages of stocks and marketable securities, see *ante*, p. * 1067.

(*i*) Schedule, tit. *Warrant for goods*.

(*m*) See the schedule, tit. *Contract note*;

(*k*) And see sect. 89, *ante*, p. * 1082.

the meaning of "Contract note" is defined by the 41 Vict. c. 15,

(*l*) For the meaning of the words "stock" and "marketable security," see sect. 2, *ante*, p. * 1052; and as to

sect. 26.

but a transfer of government stock itself does not require a stamp. (n)

By sect. 69 (1), the duty on a contract note may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the note is first executed; (2) every person who makes or executes any contract note chargeable with duty, and not being duly stamped, shall forfeit the sum of £20; (3) no broker, agent, or other person shall have any legal claim to any charge for brokerage, commission, or agency, with reference to the sale or purchase of any stock or marketable security of the value of £5 or upwards mentioned or referred to in any contract note, unless such note is duly stamped.

Share Warrants (o) issued under the provisions of the Companies Act, 1867, are liable to a duty of an amount equal to three times the amount of the *ad valorem* stamp duty which would be chargeable on a deed transferring the share specified in the warrant if the consideration for the transfer were the nominal value of such share. (p)

By the Stamp Act, 1870, sect. 127, if a share warrant is issued without being duly stamped, the company issuing the same, and also every person who, at the time when it is issued, is the managing director or secretary, or other principal officer of the company, shall forfeit the sum of £50.

Orders or Authorities for the Transfer of Mining Shares of any mining company conducted on the cost-book system, or any notice to the purser or officer of any such transfer, are charged with a duty of 6*d.*

* By sect. 128 of the Stamp Act, 1870, the duty may [* 1084] be denoted by an adhesive stamp, to be cancelled by the person by whom the authority is executed; and by subsection (2) a penalty of £20 is imposed if the order is not duly stamped.

Scrip Certificates or other documents entitling any person to become the proprietor of any share of any company or proposed

(n) *Walker v. Bartlett*, 8 C. B. 848; 25 L. J. C. P. 263; see the general exemptions at the end of the schedule, Stamp Act, 1870. (o) See the schedule, tit. *Share warrants*. (p) 30 & 31 Vict. c. 131, sect. 33.

company, or scrip certificates or other documents, issued or delivered in the United Kingdom, entitling any person to become the proprietor of any share of any foreign or colonial company or proposed company; and any scrip or other document denoting, or intended to denote, the right of any person as a subscriber in respect of any loan raised, or proposed to be raised, by any company, or proposed company; and any scrip or other document, issued or delivered in the United Kingdom, denoting, or intending to denote, the right of any person as a subscriber in respect of any loan raised, or proposed to be raised, by or on behalf of any foreign or colonial government, state, company, or corporation; and letters of allotment or renunciation, or any other document having the effect of a letter of allotment of any share of any company or proposed company, or in respect of any loan raised or proposed to be raised by any such company; or letters of allotment, issued or delivered in the United Kingdom, of any share of any foreign or colonial company, or in respect of any loan raised, or proposed to be raised, by or on behalf of any foreign or colonial government, state, company, or corporation,—are respectively chargeable with the stamp duty of 1*d*.

Adhesive Stamps.—The duties on agreements, and on bills payable on demand, contract notes, authorities for the transfer of shares in mines, contracts of insurance, &c., may be denoted by adhesive stamps, which must be carefully cancelled at the time of the execution of the contract in the mode provided, or the stamp will be of no avail. Proof of the cancelling of the stamp by writing across it the different particulars required by various acts of parliament, is either a necessary part of the evidence of the contract, (*q*) or heavy penalties are imposed for the non-observance of the statutory requirements by parties using adhesive stamps. (*r*)

Contracts for the Sale and Purchase of Land and Interests in Land, not being under seal, and not operating as an actual transfer of the property or interest agreed to be bought and sold, must be stamped as agreements; (*s*) and so also must all contracts for

(*q*) See the Stamp Act, 1870, schedule, tit. *Transfer*.

(*r*) See the Stamp Act, 1870, sects. 23–25, *ante*, pp. * 1057, * 1058.

(*s*) *Rex v. Ridgwell*, 6 B. & C. 665.

the sale and purchase or acquisition of incorporeal hereditaments (*ante*, p. * 1005) (*t*). And contracts for the sale and purchase of the * growing produce of fruit-trees, growing [* 1085] grass, growing timber, underwood, or hops, not sold with a view to its immediate severance and removal from the soil as a chattel, and where, consequently, the right to the land for a limited time for the benefit and sustenance of the growing crop passes by the contract, must be stamped with the *ad valorem* duty on conveyances on sales; (*u*) but if the growing produce is sold with a view to its immediate severance and removal as a chattel, the contract is then a contract for the sale and purchase of goods and chattels, (*x*) and as such is exempt from stamp duty.

Contracts for the Sale of Fixtures (*ante*, p. * 1004), if they amount to an actual transfer of the interest of the fixtures, must be stamped with an *ad valorem* stamp as conveyances. (*y*) But if the contract does not amount to an actual transfer of the right of property in the fixtures, and right of severance, it is properly stamped as an agreement. (*z*)

Contracts of Hiring and Service between "laborers, artificers, manufacturers, or menial servants," and their employers, are, as we have already seen, expressly exempted from all stamp duty; (*a*) but all other contracts of hiring and service must be stamped with the ordinary agreement stamp. A contract for the hiring of a clerk is not within the exemption, and must consequently be stamped. (*b*)

Contracts for the Letting and Hiring of Taskwork (*ante*, pp. * 382, * 404), or for the performance of work by the job or task, must, if the remuneration to be paid for the work is of the value of £5 or upwards, be stamped as agreements, (*c*) unless the

(*t*) *Phillips v. Morrison*, 12 M. & W. 740; *Waddington v. Bristow*, 2 B. & P. 452.

(*u*) *Cattell v. Gamble*, 5 Bing. N. C. 46; 6 Sc. 737.

(*x*) *Washbourn v. Burrows*, 1 Exch. 115.

(*y*) *Horsfall v. Key*, 17 L. J. Ex. 267.

(*z*) *Chanter v. Dickinson*, 6 Sc. N. R. 182; *Wick v. Hodgson*, 12 Moore, 213.

(*a*) A contract for the hiring of a farm bailiff at a salary, and a certain portion of the clear annual profits, does not require a stamp. *Reg. v. Wortley*, 15 Jur. 1137.

(*b*) *Dakin v. Watson*, 2 Cr. & Dix. Cir. Rep. 225.

(*c*) *Hegarty v. Milne*, 14 C. B. 627; 23 L. J. C. P. 151.

contract can be shown to be a contract for the hire of "laborers, artificers, manufacturers, or menial servants," within the exemption. A contract by a builder for the erection of a house, according to certain plans and specifications, for an agreed sum of money (*ante*, p. * 382) must be stamped as an agreement. If a contract is entered into for the sale of certain goods and chattels and fixing them up in a dwelling-house, — such as a contract for the purchase and sale of coppers, grates, and stoves, bells, locks, &c., — and one sum is to be paid for the goods and another for

the work of fixing them, the contract, so far as it relates [* 1086] to the sale of the * goods, will be exempt from stamp duty; but the provision as to the erection of the articles in the dwelling-house will require a stamp if the remuneration for the work amounts to £5. The sum to be paid for the work cannot be added to the price of the goods so as to raise the value of the subject-matter of the contract. If one entire sum only is to be paid *in solido*, the contract would probably be considered to be a contract for work and labor and the supply of materials, and would then require a stamp if the sum to be paid amounted to £5 (*ante*, p. * 1079). No contract, made pursuant to the Highway Acts, relating to the making, maintaining, or repairing of highways is chargeable with any higher duty than 6*d.* (*d*)

Calculation of the Value of an Agreement. — In calculating the value of the subject-matter of the contract, regard must be had to the consideration or immediate inducement for the undertaking or promise sought to be enforced, and not to the value of the thing *concerning* which the contract has been made; for if the consideration does not amount to £5 in value, the written memorandum of the promise does not fall within the operation of the Stamp Acts, although the subject-matter of it, or the thing to which it relates, may far exceed that value, and the breach of it may consequently give rise to a claim for damages far surpassing £5. Thus where a wharfinger receives merchandise to be warehoused and shipped under a special agreement, the value of the matter of the agreement is not the value of the merchandise, but the price of the wharfage and charge on shipment which the wharfinger is to receive as the consideration for his

(*d*) See the Stamp Act, 1870, schedule, tit. *Agreement*.

promise. (*e*) So where a parcel is delivered to a carrier to be carried under a special contract, the value of the "matter of the contract" is the price of the carriage, and not the value of the parcel. (*f*) So in the case of agreements for leases, the value of the "matter of the agreement" is not the value of the land, nor the value of the occupation, but the amount of rent reserved and agreed to be paid. (*g*) And in the case of an agreement to confess a judgment, the value of "the matter of the agreement" is not the amount of the judgment, but the debt and costs to be recovered. (*h*) And where there is an agreement to pay interest on a bill, the value of the subject-matter of the agreement is the amount of interest agreed to be paid, and not the amount of the bill. (*i*)

Contracts of Uncertain Value not measurable by any pecuniary * standard,—such as a contract of marriage, [* 1087]—do not require a stamp. (*k*) "If at the time of the making of the agreement, the subject-matter of it does not appear to be of the value of £5, a stamp does not become necessary merely because the value subsequently turns out to be a little more than £5." (*l*)

Bare Offers and Proposals not acceded to and accepted in writing, and not amounting to evidence of a concluded contract, are in general admissible in evidence without a stamp; such as a builder's or artificer's estimate of the cost of certain work, and his offer or proposal to do it upon certain terms; (*m*) a school-master's printed prospectus of the terms upon which he provides board and instruction for his pupils; (*n*) a landlord's unsigned particulars of the terms upon which he lets his land; (*o*) letters containing mere offers or proposals of salary or hire, to be paid

- (*e*) *Chadwick v. Sills*, R. & M. 15; (*l*) *Liddiard v. Gale*, 19 L. J. Ex. Baldwin v. Alsager, 13 M. & W. 366. 160; *Cox v. Bailey*, 6 Sc. N. R. 798.
 (*f*) *Latham v. Rutley*, R. & M. 13. (*m*) *Penniford v. Hamilton*, 2 Stark.
 (*g*) *Doe v. Wiggins*, 4 Q. B. 367; 475.
Doe v. Amos, 2 M. & R. 180. (*n*) *Clay v. Crofts*, 20 L. J. Ex. 361;
 (*h*) *Ames v. Hill*, 2 B. & P. 150. *Edgar v. Blick*, 1 Stark. 464.
 (*i*) *Semple v. Steinau*, 8 Exch. 624; (*o*) *Ramsbottom v. Tunbridge*, 2 M.
Pemberton v. Vaughan, 10 Q. B. 87; & S. 434; *Ramsbottom v. Mortley*, ib.
Taylor v. Steele, 16 L. J. Ex. 177. 445; *Hawkins v. Warre*, 5 D. & R. 520.
 (*k*) *Orford v. Cole*, 2 Stark. 353.

for work to be done, or services to be rendered afterward, although they are assented to and acted upon. (*p*)

Bare Admissions and Acknowledgments, also, not amounting to written evidence of a contract, and not constituting in themselves the evidence of the contract (*post*, p. * 1089), are in general admissible in evidence without a stamp: such as an "I O U £200 for value received," or a simple acknowledgment of a loan or a debt not containing upon the face of it an express promise of payment; (*q*) or a statement of accounts containing upon the face of it a simple admission or acknowledgment of a certain balance being due from the defendant to the plaintiff; (*r*) or a mere attornment in writing from a tenant to his landlord, unaccompanied by any terms or conditions; (*s*) or a proviso inserted in a stamped receipt to the effect that the acceptance of the rent should not operate as a waiver of a previous notice to quit; (*t*) or a simple acknowledgment of an advance of money on furniture; or a *cognovit* containing no words or terms of agreement. (*u*) But if there be any terms or conditions for the payment of money by instalments or otherwise, it is an agreement within the statute. If, therefore, to an I O U for £40 be added the words, "to be paid on the 22d instant," the instrument must be stamped as a promissory note. (*x*) An [* 1088] undertaking by an * attorney to recover the amount of a bill deposited with him, or to re-deliver the same to the plaintiff, or a mere acknowledgment of a duty which a party takes upon himself to perform, or a mere memorandum of deposit of bills, to get discounted or return on demand, is not "evidence of a contract" within the meaning of the Stamp Acts. (*y*)

A mere acknowledgment that a party holds wine or goods as a bailee or depositary is admissible in evidence without a stamp. (*z*)

(*p*) *Hudspeth v. Yarnold*, 9 C. B. 625; 19 L. J. C. P. 321.

(*q*) *Israel v. Israel*, 1 Campb. 499; *White v. North*, 3 Exch. 689; *Hyne v. Dewdney*, 21 L. J. Q. B. 278; *Melanotte v. Teasdale*, 13 L. J. Ex. 358.

(*r*) *Goodyear v. Simpson*, 15 M. & W. 16.

(*s*) *Doe v. Smith*, 8 Ad. & E. 255.

(*t*) *Doe v. Fuller*, Tyr. & Gr. 17.

(*u*) *Huxley v. O'Connor*, 8 C. & P. 204; *Ames v. Hill*, 2 B. & P. 150;

Reardon v. Swabey, 4 East, 188.

(*x*) *Brooks v. Elkins*, 2 M. & W. 74.

(*y*) *Langdon v. Wilson*, 7 B. & C. 640, n. (*b*); *Mullett v. Hutchinson*, ib. 639.

(*z*) *Blackwell v. M'Naughton*, 1 Q. B.

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And so is a mere acknowledgment of a tenancy upon sufferance, although it contains upon the face of it an agreement to give immediate possession to the landlord. (a) A draft agreement, having on the back of it, "we approve of the draft," signed by the plaintiff and defendant, was admitted in evidence, for the purpose of proving an admission of the parties. (b) Any mere admission, indeed, or acknowledgment in writing, amounting simply to a link in the chain of evidence by which a contract or agreement is sought to be established, may be given in evidence without a stamp, such as an advertisement in the newspapers, intended to establish the simple fact of a dissolution of partnership, (c) or an unsigned statement of the terms upon which lands are let, (d) or of the mode in which the value of certain articles, growing crops, &c., should be calculated and ascertained, (e) or a mere written consent to the institution of certain legal proceedings, or a mere consent to the performance of any other act, matter, or thing. (f)

A mere acknowledgment of the terms upon which a bill of exchange has been deposited, (g) or an acknowledgment of the receipt of title-deeds by way of deposit as a security for the repayment of money, is not an agreement within the meaning of the Stamp Acts, and does not require an agreement stamp. Therefore, where a document stamped as a promissory note contained, beside the ordinary promise to pay, a memorandum of a deposit of counterpart leases as a collateral security for the payment of the amount of the note, it was held that an agreement stamp was not necessary in addition to the promissory note stamp. (h) But if the admission or acknowledgment is coupled with a promise or undertaking, it becomes then either a promissory note or an agreement, and must be stamped accordingly. A mere * attornment in writing does [*1089]

(a) *Barry v. Goodman*, 2 M. & W. 769.

(b) *Doe v. Pedgriph*, 4 C. & P. 312; *Frazer v. Bunn*, 8 C. & P. 704.

(c) *Jenkins v. Blizard*, 1 Stark. 418.

(d) *Lord Bolton v. Tomlin*, 5 Ad. & E. 862.

(e) *Marshall v. Powell*, 16 L. J. Q. B. 5.

(f) *Hill v. Johnson*, 3 C. & P. 456.

(g) *De Porquet v. Page*, 15 Q. B. 1073.

(h) *Fancourt v. Thorne*, 15 L. J. Q. B. 344; *Pyle v. Partridge*, 15 M. & W. 20.

not require a stamp; (*i*) but if it is expressed to be made upon certain terms and conditions; if it proceeds to state the amount of rent and the mode of payment, and to set forth the terms of the tenancy, and is signed and witnessed, it is evidence of an agreement chargeable with duty. (*k*) And whenever the writing constitutes in itself the sole evidence of the contract sought to be enforced, it is inadmissible without a stamp, whether it has or has not been signed by the parties against whom it is offered in evidence. (*l*)

Acknowledgments of Debts in Writing, given in evidence for the purpose of barring the Statute of Limitations, are expressly exempted from the operation of the Stamp Acts. (*m*) But if the writing amount to a promissory note, it cannot be received in evidence without a promissory note stamp. (*n*)

Bare Licenses and Authorities not amounting in themselves to evidence of a contract may likewise be given in evidence without a stamp, such as an authority to discharge a debt or pay money, or to institute legal proceedings, or to sell goods, or to leave apartments without notice, (*o*) or to make a second distress, (*p*) or to continue a distress on the land, the landlord giving time for payment, (*q*) or a minute of a resolution of a company authorizing the appointment of a clerk, and fixing the amount of his salary, or authorizing the acceptance of a tender for work to be done upon certain terms, (*r*) or an authority or request to provide board and lodging for an illegitimate child. (*s*) But if there is no other evidence of the contract but what is afforded by the written memorandum, then the memorandum must be stamped as an agreement. (*t*)

Simple Contracts of Deposit and Pledge.—An agreement for

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| (<i>i</i>) Doe v. Edwards, 5 Ad. & E. 95. | Bethell v. Blencowe, 3 Sc. N. R. 568– |
| (<i>k</i>) Cornish v. Searell, 8 B. & C. 471; | 573. |
| Doe v. Frankis, 11 Ad. & E. 792. | (<i>p</i>) Hill v. Ramm, 6 Sc. N. R. 571; |
| (<i>l</i>) Chadwick v. Clark, 1 C. B. 700. | Pyle v. Partridge, 15 M. & W. 20. |
| (<i>m</i>) 9 Geo. IV. c. 14, sect. 8; Morris | (<i>q</i>) Fishwick v. Milnes, 19 L. J. Ex. |
| v. Dixon, 4 Ad. & E. 845. | 153. |
| (<i>n</i>) Jones v. Ryder, 4 M. & W. 35; | (<i>r</i>) Vaughton v. Brine, 1 Sc. N. R. |
| Parmiter v. Parmiter, 30 L. J. Ch. 508. | 258; Lucas v. Beach, ib. 350. |
| (<i>o</i>) Parker v. Dubois, 1 M. & W. 30; | (<i>s</i>) Beeching v. Westbrook, 8 M. & |
| Humphrey v. Briant, 4 C. & P. 157; | W. 411. |
| Diplock v. Hammond, 23 L. J. Ch. 550; | (<i>t</i>) Bowen v. Fox, 2 M. & R. 167. |

the deposit of goods and chattels, bills of lading, or dock warrants, as a security for the repayment of money advanced, is sufficiently stamped with a common 6*d.* agreement stamp, and does not require, unless it is accompanied with a deposit of title-deeds, the *ad valorem* mortgage stamp. (*u*) A mortgage stamp is required only where there is a regular conveyance by way of security for the repayment of money, and not where there has * been merely a deposit of goods, or of some [* 1090] document relating to goods, as a bill of lading or dock warrant. (*x*) If the document does not amount to an agreement, but to a mere admission or acknowledgment of the deposit as a security for the payment of the money, no stamp at all is required, unless it contains a promise for the payment of money, in which case it must be stamped as a promissory note. (*y*)

Bank Notes for money not exceeding £1 require a stamp of 5*d.*; exceeding £1 and not £2, 10*d.*; exceeding £2 and not £5, 1*s.* 3*d.*; exceeding £5 and not £10, 1*s.* 9*d.*; exceeding £10 and not £20, 2*s.*; exceeding £20 and not £30, 3*s.*; exceeding £30 and not £50, 5*s.*; exceeding £50 and not £100, 8*s.* 6*d.*

By the Stamp Act, 1870, sect. 45, the term "banker" means and includes any corporation, society, partnership, and persons, and every individual person carrying on the business of banking in the United Kingdom. The term "bank note" means and includes: (1) any bill of exchange or promissory note issued by any banker, other than the governor and company of the Bank of England, for the payment of money not exceeding £100 to the bearer on demand; (2) any bill of exchange or promissory note so issued which entitles or is intended to entitle the bearer or holder thereof, without indorsement, or without any farther or other indorsement than may be thereon at the time of the issuing thereof, to the payment of money not exceeding £100 on demand, whether the same be so expressed or not, and in whatever form, and by whomsoever such bill or note is drawn or made.

(*u*) See the Stamp Act, 1870, schedule, tit. *Mortgage*, and also sect. 105, *Attenborough, In re*, 11 Exch. 463; 25 L. J. Ex. 22.
ante, p. *1067.

(*y*) *Pyle v. Partridge*, 15 M. & W. 20;

(*x*) *Harris v. Birch*, 9 M. & W. 594; *Fancourt v. Thorne*, 15 L. J. Q. B. 344.

By sect. 46, a bank note issued duly stamped, or issued unstamped by a banker duly licensed or otherwise authorized to issue unstamped bank notes, may be from time to time reissued without being liable to any stamp duty by reason of such reissuing.

By sect. 47, (1) if any banker, not being duly licensed or otherwise authorized to issue unstamped bank notes, issues, or causes or permits to be issued, any bank note not being duly stamped, he shall forfeit the sum of £50; (2) if any person receives or takes any such bank note in payment or as a security, knowing the same to have been issued unstamped contrary to law, he shall forfeit the sum of £20.

Bills of Exchange and Promissory Notes. — Bills of exchange payable on demand are liable to a duty of 1*d.* Bills of exchange of any other kind whatsoever (except a bank note), and [* 1091] all * promissory notes (except a bank note) drawn or expressed to be payable or actually paid or indorsed or in any manner negotiated in the United Kingdom for any sum of money not exceeding £5, require a stamp of 1*d.*; exceeding £5 and not £10, 2*d.*; £10 and not £25, 3*d.*; £25 and not £50, 6*d.*; £50 and not £75, 9*d.*; £75 and not £100, 1*s.*; exceeding £100, 1*s.* for every £100 or part of £100. (z)

By sect. 48, (1) the term "bill of exchange" for the purposes of this act includes also draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money therein mentioned; (2) an order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed for the purposes of this act a bill of exchange for the payment of money on demand; (3) an order for the payment of any sum of money weekly, monthly, or at any other stated

(z) The Stamp Act, 1870, schedule, *Bill of Exchange*, *Bradlaugh v. Rin*, L. R. 5 C. P. 473.

periods, and also any order for the payment by any person at any time after the date thereof of any sum of money, and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf, is to be deemed for the purposes of this act a bill of exchange for the payment of money on demand.

By sect. 49, (1) the term "promissory note" means and includes any document or writing (except a bank note) containing a promise to pay any sum of money; (2) a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed for the purposes of this act a promissory note for the said sum of money.

By sect. 50, the fixed duty of 1*d.* on a bill of exchange for the payment of money on demand may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the bill is signed before he delivers it out of his hands, custody, or power.

By sect. 51, (1) the *ad valorem* duties upon bills of exchange * and promissory notes drawn or made out [* 1092] of the United Kingdom are to be denoted by adhesive stamps; (2) every person into whose hands any such bill or note comes in the United Kingdom before it is stamped, shall, before he presents for payment, or indorses, transfers, or in any manner negotiates, or pays, such bill or note, affix thereto a proper adhesive stamp or proper adhesive stamps of sufficient amount, and cancel every stamp so affixed thereto; (3) provided as follows: (a) if at the time when any such bill or note comes into the hands of any *bona fide* holder thereof there is affixed thereto an adhesive stamp effectually obliterated, and purporting and appearing to be duly cancelled, such stamp shall, so far as relates to such holder, be deemed to be duly cancelled, although it may not appear to have been so affixed or cancelled by the proper person; (b) if at the time when any such bill or note comes into the hands of any *bona fide* holder thereof there is affixed thereto an adhesive stamp not duly cancelled, it shall be competent for

such holder to cancel such stamp as if he were the person by whom it was affixed, and upon his so doing such bill or note shall be deemed duly stamped, and as valid and available as if the stamp had been duly cancelled by the person by whom it was affixed; (4) but neither of the foregoing provisos is to relieve any person from any penalty incurred by him for not cancelling any adhesive stamp. Presenting a foreign bill for acceptance is not negotiating it within the meaning of this section. (a)

By sect. 52, a bill of exchange or promissory note purporting to be drawn or made out of the United Kingdom is, for the purposes of this act, to be deemed to have been so drawn or made, although it may in fact have been drawn or made within the United Kingdom.

By sect. 53, (1) where a bill of exchange or promissory note has been written on material bearing an impressed stamp of sufficient amount but of improper denomination, it may be stamped with the proper stamp on payment of the duty, and a penalty of 40s. if the bill or note be not then payable according to its tenor, and of £10 if the same be so payable; (2) except as aforesaid, no bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof.

By sect. 54, (1) every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped shall forfeit the sum of £10, and the person who takes or receives from any other person any such bill or note not being duly stamped either in payment or as a security, or by purchase or otherwise, *shall not be entitled to recover thereon, or to make the same available for any purpose whatever. (2) Provided that if any bill of exchange for the payment of money on demand, liable only to the duty of 1d., is presented for payment unstamped, the person to whom it is so presented may affix thereto a proper adhesive stamp, and cancel the same, as if he had been the drawer of the bill, and may, upon so doing, pay the sum in the said bill mentioned, and charge the duty in account against the person by whom

(a) *Sharples v. Bickard*, 2 H. & N. 57; 26 L. J. Ex. 302.

the bill was drawn, or deduct such duty from the said sum, and such bill is, so far as respects the duty, to be deemed good and valid. (3) But the foregoing proviso is not to relieve any person from any penalty he may have incurred in relation to such bill.

By sect. 55, when a bill of exchange is drawn in a set according to the custom of merchants, and one of the set is duly stamped, the other or others of the set shall, unless issued or in some manner negotiated apart from such duly stamped bill, be exempt from duty; and upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of the set which has not been issued or in any manner negotiated apart from such lost or destroyed bill may, although unstamped, be admitted in evidence to prove the contents of such lost or destroyed bill.

The stamp duty upon a protest of any bill of exchange or promissory note, where the duty on the bill or note does not exceed 1s., is the same as the duty upon the bill or note, and in every other case the stamp duty is 1s.; (b) and by sect. 116, the duty upon a notarial act and upon the protest by a notary public may be denoted by an adhesive stamp, &c.

Any words in writing, importing a promise to pay a sum certain, are a promissory note within the meaning of the Stamp Acts, and must be stamped accordingly, unless the promise is to pay a sum already secured by a duly stamped promissory note. (c) But if the amount is uncertain, or the money is made payable on terms and conditions rendering the contract a special agreement, it should have an agreement stamp. (d) Bills of exchange cannot be reissued after they have once been paid without a fresh stamp; (e) but a party paying an accommodation bill after maturity, on behalf of the acceptor, may bring an action against the drawer without having the bill restamped; for there is no reissue of the bill in such a case. To make a fresh stamp * necessary there must be a pay- [* 1094]

(b) See the schedule, tit. *Protest*.

441; *Walker v. Roberts*, Car. & Marsh.

(c) *Drury v. Macaulay*, 16 M. & W. 590; *Shelton v. James*, 5 Q. B. 199.

146; *Ellis v. Mason*, 7 Dowl. P. C. 598;

(d) *Cholmeley v. Darley*, 14 M. &

Wheatley v. Williams, 1 M. & W. 533;

W. 344.

Shrivell v. Payne, 8 Dowl. P. C.

(e) 55 Geo. III. c. 184, sect. 10.

ment by the party ultimately liable. (*f*) A mere authority to pay money does not require a bill of exchange stamp. (*g*)

Post-Dating Cheques. — The date upon the face of a cheque or draft must be taken to be the date of the issue of the instrument; and if the stamp is conformable therewith, the cheque or draft is admissible in evidence, although it was post-dated; but the maker is liable to a penalty. (*h*)

What Instruments are Bills of Exchange within the Stamp Acts. — It was the object of the legislature to treat as bills of exchange, and to subject to stamp duty, all such drafts and orders as, being payable on a contingency, or out of a particular fund, would not otherwise, in strictness of law, have fallen under that denomination. (*i*) If no sum whatever is expressed in the order, and the total amount directed to be paid is indefinite, there is nothing to determine the amount of the stamp duty; and the instrument cannot consequently be stamped at all. (*k*)

The duties upon bills of exchange and promissory notes are subject to the following exemptions: (1) Bill or note issued by the governor and company of the Bank of England or Bank of Ireland. (2) Draft or order drawn by any banker in the United Kingdom upon any other banker in the United Kingdom, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers. (3) Letter written by a banker in the United Kingdom to any other banker in the United Kingdom, directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made, or to any person on his behalf. (4) Letter of credit granted in the United Kingdom, authorizing drafts to be drawn out of the United Kingdom payable in the United Kingdom. (5) Draft or order drawn by the Accountant-

(*f*) *Thomas v. Fenton*, 16 L. J. Q. B. 362; *Lazarus v. Cowie*, 3 Q. B. 459; *Jewell v. Parr*, 22 L. J. C. P. 253; 13 C. B. 914. yard, 6 B. & S. 687; 34 L. J. Q. B. 217; *Bull v. O'Sullivan*, L. R. 6 Q. B. 209; *Gatty v. Fry*, 2 Ex. D. 265; *Clarke v. Roche*, 3 Q. B. D. 170.

(*g*) *Hamilton v. Spottiswoode*, 4 Exch. 210.

(*i*) *Firbank v. Bell*, 1 B. & Ald. 39; *Butts v. Swan*, 4 Moore, 485.

(*h*) *Williams v. Jarrett*, 5 B. & Ad. 32; *Whistler v. Forster*, 14 C. B. n. s. 248; 32 L. J. C. P. 161; *Austin v. Bun-*

(*k*) *Crowfoot v. Gurney*, 2 M. & Sc. 473; *Jones v. Simpson*, 3 D. & R. 545.

General of the Court of Chancery, in England or Ireland. (6) Warrant or order for the payment of any annuity granted by the commissioners for the reduction of the national debt, or for the payment of any dividend or interest on any share in the government or parliamentary stocks or funds. (7) Bill drawn by the Lords Commissioners of the Admiralty, or by any person under their * authority, under the authority of any [* 1095] act of parliament upon and payable by the Accountant-General of the Navy. (8) Bill drawn (according to a form prescribed by her Majesty's orders by any person duly authorized to draw the same) upon and payable out of any public account for any pay or allowance of the army or other expenditure connected therewith. (9) Coupon or warrant for interest attached to and issued with any security.

Bills of Lading (*ante*, pp. * 491, * 935, * 966) of any goods, merchandise, or effects to be exported or carried coastwise, require a 6*d.* stamp.

By the Stamp Act, 1870, sect. 56, they are not to be stamped after execution, and a penalty of £50 is imposed upon every person who makes or executes a bill of lading not duly stamped. (*l*)

Contracts of Insurance upon any ship or vessel, or upon the machinery, tackle, or furniture, or upon any goods, merchandise, or property on board thereof, or upon the freight, or upon any other interest which may be lawfully insured in or relating to any ship or vessel for or upon any voyage (*ante*, p. * 674), are charged for every £100, and also for any fractional part of £100, thereby insured, a stamp duty of 3*d.* For every policy of insurance for time, where the insurance is not for more than six months, the duty for every £100, and for any fractional part of £100, is 3*d.* (*m*) The premium or consideration in nature thereof, and the particular risk or adventure, the names of the subscribers, and the sums insured, must be expressed in the policy; and no policy can be made for any time exceeding twelve months. (*n*) Where an insurance is made for a voyage, and also for time, or

(*l*) The Stamp Act, 1870, schedule, tit. *Bills of lading*.

(*m*) 30 Vict. c. 23, sched. B.

(*n*) 30 Vict. c. 23, sects. 7, 8.

to extend to or cover any time beyond twenty-four hours after the ship shall have arrived at her destination, and been there moored at anchor, the policy is chargeable with duty as a policy for a voyage, and also with duty as a policy for time. (o)

By the Stamp Act, 1870, sect. 117 (2), a policy of sea insurance made or executed out of, but being in any manner enforceable within, the United Kingdom, is to be charged with duty under the 30 Vict. c. 23, and may be stamped at any time within two months after it has been first received in the United Kingdom on payment of the duty only. By the 39 Vict. c. 6, sect. 2, the 16th section (p) of the Stamp Act, 1870, is made to apply to a policy of sea insurance, and such insurance may be legally stamped after execution on penalty of £100.

It was held that when several interests are insured by one contract or policy, the duty must be calculated upon [* 1096] the amount * of the several interests, and paid on the fractional part of £100 of every separate interest; if it is uncertain at the time the contract is made into what fractional parts the whole sum may be divided in proportion to the several interests, a stamp must be imposed large enough to cover all of them. (q) But now a policy of sea insurance, by which the separate and distinct interests of two or more persons are insured, stamped in respect of the aggregate but not in respect of each interest, may be stamped with an additional stamp within one month after the last risk has been declared. (r) Alterations in policies of sea insurance otherwise legal, must be made before notice of the determination of the risk originally insured, and must not prolong the time covered by the insurance beyond six months, in the case of a policy made for a less period than six months, or beyond twelve months, in the case of a policy made for more than six months; and the articles insured must remain the property of the same person; and no additional sum may be insured by means of the alteration. Where any carrier by sea, or other person, in consideration of any sum paid for additional freight or otherwise, agrees to take upon himself any

(o) 30 Vict. c. 23, sect. 11.

(p) *Ante*, p. * 1057.

(q) *Rapp v. Allnutt*, 15 East, 601.

(r) 39 Vict. c. 6, sect. 1.

risk attending property of any description while on board, or engages to indemnify the owner of the property from risk, loss, or damage, such agreement or engagement is to be deemed a contract for sea insurance. (*s*)

Contracts of Insurance against Accidents.—By the Stamp Act, 1870, there is imposed upon every policy of insurance for any payment agreed to be made upon the death of any person only from accident, or violence, or otherwise than from a natural cause, or as compensation for personal injury, a stamp duty of 1*d.* (*t*)

Contracts of Insurance of Property.—Policies of insurance for any payment agreed to be made by way of indemnity against loss or damage of or to any property are liable to a duty of 1*d.* (*u*)

Contracts of Insurance upon any Life or Lives.—Policies of insurance upon any life or lives, or upon any event or contingency relating to, or depending upon, any life or lives (except accidents) are charged, where the sum insured does not exceed £10, with a stamp duty of 1*d.*; and where it exceeds £10 but not £25, 3*d.*; and where it exceeds £25 and not £500, with a stamp duty of 6*d.* for every £50 and every fractional part of £50; and where it exceeds £500 and not £1000, then for every £100, and any fractional part of £100, 1*s.*; and when it exceeds £1000, then for every £1000, and any fractional part of £1000, 10*s.* (*x*)

* By the Stamp Act, 1870, sect. 117 (1), the term [* 1097] “insurance” includes assurance, and the term “policy” includes every writing whereby any contract of insurance is made, or agreed to be made, or is evidenced; and except as hereinafter mentioned, this act does not apply to policies of sea insurance. (*y*)

By sect. 118, every person who (1) receives, or takes credit for, any premium or consideration for any contract of insurance, and does not, within one month after receiving, or taking credit

(*s*) 30 Vict. c. 23, sects. 10, 12.

(*t*) Schedule, tit. *Policy of insurance*. — ances made prior to the 25th July, 1869, see the 32 & 33 Vict. c. 14, sect. 12.

ance.

(*u*) See the schedule, tit. *Policy of*

insurance. With respect to fire insur-

(*x*) See the schedule, tit. *Policy*.

(*y*) As to sea insurance, see *ante*, p. * 1095.

for, such premium or consideration, make out and execute a duly stamped policy of such insurance; (2) makes, executes, or delivers out, or pays or allows in account, or agrees to pay or allow in account, any money upon or in respect of any policy which is not duly stamped, shall forfeit the sum of £20.

By sect. 119 (1), the duties imposed by this act upon policies of insurance may be denoted by adhesive stamps, or partly by adhesive and partly by impressed stamps. (2) When the whole or any part of the duty upon a policy of insurance is denoted by an adhesive stamp, such adhesive stamp is to be cancelled by the person by whom the policy is first executed. (3) In default of such cancellation, the person making the insurance shall forfeit the sum of £20.

Receipts given for or upon the payment of money amounting to £2 or upwards are liable to a stamp duty of 1*d*. The following are the exemptions:—(1) Receipt given for money deposited in any bank, or with any banker, to be accounted for and expressed to be received of the person to whom the same is to be accounted for. (2) Acknowledgment by any banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment. (3) Receipt given for or upon the payment of any parliamentary taxes or duties, or of money to or for the use of her Majesty. (4) Receipt given by the Accountant-General of the Navy for any money received by him for the service of the navy. (5) Receipt given by any agent for money imprested to him on account of the pay of the army. (6) Receipt given by any officer, seaman, marine, or soldier, or his representatives, for or on account of any wages, pay, or pension due from the admiralty or army pay office. (7) Receipt given for the consideration money for the purchase of any share in any of the government or parliamentary stocks or funds, or in stock of the East India Company, or in the stocks and funds of the Secretary of State in Council of India, or of the governor and company of the Bank of England, or of the Bank of Ireland, or for any dividend paid on any share [* 1098] of the said stocks or funds * respectively. (8) Receipt given for any principal money or interest due on an exchequer bill. (9) Receipt written upon a bill of exchange or

promissory note duly stamped. (10) Receipt given upon any bill or note of the governor and company of the Bank of England or the Bank of Ireland. (11) Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, and acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned. (12) Receipt given for drawback or bounty upon the exportation of any goods or merchandise from the United Kingdom. (13) Receipt given for the return of any duties of customs upon certificates of over entry. (14) Receipt indorsed upon any bill drawn by the Lords Commissioners of the Admiralty, or by any person under their authority, or under the authority of any act of parliament, upon and payable by the Accountant-General of the Navy.

By the Stamp Act of 1870, sect. 120, the term "receipt" means and includes any note, memorandum, or writing whatsoever whereby any money amounting to £2 or upwards, or any bill of exchange or promissory note for money amounting to £2 or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of £2 or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person.

By sect. 121, the duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.

By sect. 122, a receipt given without being stamped may be stamped with an impressed stamp upon the terms following,—that is to say, (1) within fourteen days after it has been given, on payment of the duty and a penalty of £5; (2) after fourteen days, but within one month, after it has been given, on payment of the duty and a penalty of £10; and shall not in any other case be stamped with an impressed stamp.

By sect. 123, if any person (1) gives any receipt liable to duty and not duly stamped; (2) in any case where a receipt would be liable to duty refuses to give a receipt duly stamped; (3)

upon a payment to the amount of £2 or upwards gives a receipt for a sum not amounting to £2, or separates or divides the amount paid with intent to evade the duty, — he shall forfeit the sum of £10.

If the receipt appears to be an acknowledgment of the receipt of money paid by way of gift and gratuity, and not in [* 1099] discharge * of a debt, claim, or demand, it is not within the statute. (z) A memorandum or acknowledgment of the receipt of money or bills or securities, by way of deposit, does not require a receipt stamp; for the words of the stamp acts, "every receipt or discharge given for or upon the payment of money," clearly apply to writings given as a discharge of money antecedently due, and not to an acknowledgment that money has been deposited to be accounted for on demand. (a) If a receipt for money and an agreement are written on the same piece of paper, the receipt is admissible in evidence if it has a receipt stamp, although there be no agreement stamp. (b)

(z) *Boyle v. Brandon*, 13 M. & W. 545; 6 B. & C. 542; *Levy v. Alexander*, 738. 19 L. J. Ex. 113; 4 Exch. 485.

(a) *Tomkins v. Ashby*, 9 D. & R.

(b) *Grey v. Smith*, 1 Campb. 387.

BOOK V.

[* 1100]

THE BREACH, AVOIDANCE, DISCHARGE, AND TRANSFER
OF CONTRACTS.

CHAPTER I.

OF REMEDIES FOR BREACH OF CONTRACT.

SECTION I.

DAMAGES.¹⁰⁵

Compensation in Damages for Breach of Contract.¹ — Whenever one party to a contract has failed in performing what he has

¹ The general subject of damages is covered by several excellent treatises. Consult 1 Sutherland, Dam. (1882) c. 3; 1 Sedgwick, Meas. Dam. (7th ed. 1880) particularly c. 1. General view; c. 3, Remote and consequential damages; c. 7, Damages in actions on contracts; also, Sedgwick, Lead. Cas. Meas. Dam. (1878); Eggleston, Dam. (1880); Field, Dam. (1876) c. 1, 4; N. Y. Civil Code as reported by the Commissioners, sects. 1832-1879, with the notes thereon, where rules for measuring the damages on various causes of action are suggested.

See, further, as to the measure of damages in actions upon various contracts, —

Real Estate: 2 Suth. Dam. c. 3; 1 Sedgw. Meas. Dam. c. 4, 5, 6; Sedgw. Lead. Cas. Meas. Dam. 1-99, 490-511; Eggleston, Dam. c. 27, 28, 29; Field, Dam. c. 16; Baltimore, &c. Soc. v. Smith, 54 Md. 187.

Sale of Personality: 2 Suth. Dam. c. 4; 1 Sedgw. Meas. Dam. c. 10; Sedgw. Lead. Cas. Meas. Dam. 220-324; Field, Dam. c. 12; Eggleston, Dam. c. 32; Cary v. Gruman, 4 Hill (N. Y.) 625, 40 Am. Dec. 299, and note by A. C. Freeman, ib. 303.

Notes and Bills: 2 Suth. Dam. c. 2; 1 Sedgw. Meas. Dam. c. 8; Sedgw. Lead. Cas. Meas. Dam. 481; Eggleston, Dam. c. 30; Field, Dam. c. 11.

Suretyship: 2 Suth. Dam. c. 7; 2 Sedgw. Meas. Dam. c. 11; Sedgw. Lead. Cas. Meas. Dam. 420; Field, Dam. sects. 710, 774; Eggleston, Dam. c. 31.

Agency: 2 Sedgw. Meas. Dam. c. 12; Sedgw. Lead. Cas. Meas. Dam. 384; 1 Suth. Dam. 31, 129, 622.

Carriers: 2 Sedgw. Meas. Dam. c. 13; Sedgw. Lead. Cas. Meas. Dam. 99-220;

¹⁰⁵ See Appendix, Vol. III.

undertaken to do in favor of another contracting party, the latter is entitled to compensation in damages, — that is, so far as money can do it, he is to be placed in the same situation with respect to damages as if the contract had been performed. (a) All evidence tending to show what the damages really are is admissible; but the pecuniary consideration given for the contract is no criterion of the pecuniary damage resulting from the breach of it. (b) Damages may be recovered, although the plaintiffs are not entitled to the whole in their own right, and although the damages are divisible between the plaintiffs and other parties in certain unknown proportions; (c) but the right to recover is of course confined to the parties to the contract. (d)

Nominal Damages. — Whenever a contract has been broken, and no particular or precise damage can be proved to have been sustained, and no evidence of actual damage can be given, nominal damages are recoverable as a matter of course. (e)

2 Suth. Dam. 406; 1 ib. 29, 59, 85, 100, 155; *The Sylvan Glen*, 9 Fed. Reporter, 355.

Insurance: 1 Sedgw. Meas. Dam. c. 9; 1 Suth. 243; Sedgw. Lead. Cas. Meas. Dam. 421, 810; Field, Dam. c. 19; Eggleston, Dam. c. 38.

Contracts for Services: 2 Suth. Dam. c. 5, 6; Sedgw. Lead. Cas. Meas. Dam. 407-420; 2 Sedgw. Meas. Dam. 78, n., 81, n.; Field, Dam. c. 13; Eggleston, Dam. c. 33.

Bailments, generally: Field, Dam. c. 14; Eggleston, Dam. c. 34.

Telegraph Companies: Sedgw. Lead. Cas. Meas. Dam. 809; Eggleston, Dam. c. 35; 1 Suth. Dam. 10; 2 Sedgw. Meas. Dam. 122, n.

As to damages under statutes, consult 2 Sedgw. Meas. Dam. c. 23; Sedgw. Lead. Cas. Meas. Dam. 793; 2 Suth. Dam. 80, 89; Field, Dam. c. 21, 36; Eggleston, Dam. c. 13.

When a breach of contract may be actionable as a tort, see *Rich v. New York Central, &c. R. R. Co.*, 87 N. Y. 382.

Regarding nominal damages, see 1 Suth. Dam. c. 2; 1 Sedgw. Meas. Dam. c. 2; Sedgw. Lead. Cas. Meas. Dam. 145, 453, 634, 809; Eggleston, Dam. c. 20; Field, Dam. c. 36. Regarding excessive damages, see note, *post*, p. *1110.

Regarding exemplary damages, see 1 Suth. Dam. c. 9; 2 Sedgw. Meas. Dam. 323 n.; Sedgw. Lead. Cas. Meas. Dam. 741; Field, Dam. c. 6; report of N. Y. Civil Code, sects. 1839, 1868.

Regarding consequential damages, see 40 Am. Dec. 257, n.

(a) *Robinson v. Harman*, 1 Exch. 855; 18 L. J. Ex. 202; see, however, *Wigsell v. School for Indigent Blind*, 8 Q. B. D. 357; see *post*, p. *1107.

(b) *Brady v. Oastler*, 33 L. J. Ex. 300.

(c) *Robertson v. Waite*, 8 Exch. 299.

(d) *Winterbottom v. Wright*, 10 M. & W. 115; *Blakemore v. Bristol & Exeter Ry. Co.*, 8 El. & Bl. 1049; *West v. Houghton*, 4 C. P. D. 197; *Haven v. Pender*, 9 Q. B. D. 302.

(e) *Ashby v. White*, 2 Ld. Raym.

If, therefore, * on a breach of contract, the jury are [* 1101] unable to ascertain the amount of damages, but find a verdict for the defendant, the court will permit the plaintiff to enter a verdict for nominal damages. (*f*) But a creditor who has received the full amount of a debt due to him in satisfaction and discharge of the debt cannot sue for nominal damages in respect of the detention or non-payment of the money due. (*g*)

General and Special Damages. — In the case of a warranty of the health and soundness of cattle at the time of a sale thereof, the general damage resulting from the breach of warranty is the deterioration in the value of the cattle resulting from disease; special damage may arise if the diseased cattle are mixed with other flocks, and communicate to them a contagious disorder. (*h*) In an action for the breach of a covenant to repair, the general damages are such a sum as it will cost to put the premises into repair. Special damages may arise and be recoverable if the covenantee is himself only a lessee of the premises, holding them under a like covenant to repair, and has been sued by the original lessor, and compelled to pay damages and costs in consequence of the defendant's breach of covenant. (*i*) Similar rules and principles as to general and special damages prevail in the civil and continental law. (*k*) "If," observes Touillier, "an architect who has contracted to build a house for a tenant constructs it so ill that the house falls, this may cause four sorts of loss, — first, the expense of rebuilding; second, the loss of the rent that the proprietor would have received; third, the damage done to the tenant; fourthly, the loss of the furniture in the house: for all these the architect may be responsible; but he would not be liable for jewels or articles of extraordinary value." (*l*) In the case of contracts for the payment of a specified sum of money, the general damages are obviously the sum agreed to be paid,

955; *Van Wort v. Woolley*, 1 M. & M. v. Mason, L. R. 1 C. P. 559; 35 L. J. 520; *Marzetti v. Williams*, 1 B. & Ad. C. P. 299.

424. (*i*) *Smith v. Howell*, 6 Exch. 737; 20

(*f*) *Feize v. Thompson*, 1 Taunt. L. J. Ex. 377.

121. (*k*) Cod. Civ. liv. 3, tit. 3, sects.

(*g*) *Beaumont v. Greathead*, 2 C. B. 1149–1151; *Duranton*, Cours de Droit, 500. 10, Nos. 480, 481.

(*h*) Poth. *Obligations*, No. 166; *Sedgwick on Damages*, 96; and see *Mullett* (*l*) *Touillier*, Droit Civ. liv. 3, tit. 3, c. 3, vol. 6, p. 290.

if the contract has been fully and properly performed by the plaintiff, and nothing has been paid on account. But when the contract is not for the payment of a specific sum of money at an appointed time, but for the performance of some particular act, the plaintiff is entitled to a full and fair compensation for the injury and inconvenience resulting from the breach of contract,

and the court will not tie a jury down to any nice [* 1102] calculation, but will leave them considerable * latitude in assessing the damages. (*m*) It is not usual with the courts to grant a new trial on the ground that the damages are smaller than the court may think reasonable, unless the judge who tried the cause is dissatisfied with the smallness of the damages. (*n*) Where the damages recovered are under £20, the court will not grant a new trial unless the verdict is a "perverse verdict." (*o*)

Damages are recoverable only up to the time of the commencement of the action; but the prospective as well as the present injury sustained at the time the action was commenced may be regarded in determining what will be a fair compensation to be awarded to the plaintiff. (*p*)

Recovery of Interest Generally.¹ — As regards the recovery of interest at common law, the general rule is, that interest is allowed only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances. In the case of bills of exchange and promissory notes, made payable with interest, the interest runs from the day of the date of the bill or note; if they are silent as to interest, it is payable only from the time when the bill or note becomes due. The interest forms part of the damages, and the jury may allow such a reasonable amount as they think proper. (*q*) When a

¹ 1 Suth. Dam. c. 8; 2 Sedgw. Meas. Dam. c. 15; Sedgw. Lead. Cas. 525; report of N. Y. Civil Code, sect. 1835. U. S. Dig. tit. *Interest*.

(*m*) *Lowe v. Peers*, 2 Burr. 2225; (*o*) *Gibbs v. Tunaley*, 1 C. B. 641.
Loosemore v. Radford, 9 M. & W. 657; (*p*) Com. Dig. *Damages*, D.; *Fetter*
Sondes v. Fletcher, 5 B. & Ald. 835. *v. Beal*, 1 Raym. 339, 692.
(*n*) *Adams v. Mid. Ry. Co.*, 31 L. J. (*q*) *Roffey v. Greenwell*, 10 Ad. & E.
Ex. 35; *Ceced v. Fisher*, 9 Exch. 472. 222.

bill or note is payable on demand, interest may be given from the issuing of the writ, if there has been no previous demand. (r) In the case of a bank stopping payment, the closing of the doors of the bank dispenses with the necessity of a formal demand of payment of the notes and drafts of the bank, and interest will run upon them from the time of the stoppage. (s) As against the drawer of a bill, interest runs only from the time of his receiving notice of dishonor. (t) If goods are sold, to be paid for by a bill, and the bill be not given, interest may be recovered on the price from the time when the bill would have become due. (u) If accounts between the parties show that interest has always been claimed and allowed on sums advanced or balances unpaid, there will be evidence from which a promise to pay interest may be implied. (x) And if an express contract to pay interest is proved, the non-payment of it forms part of the general damages. (y) If no rate of interest is specified * on the face of a bill of exchange, the rate of [* 1103] interest recoverable by way of damages is the current rate of interest payable at the place where the contract was made. If, therefore, such a bill of exchange is drawn in one country, payable in another, the drawer is liable, on the dishonor of the bill, to pay interest according to the current rate of interest in the country where the bill was drawn. (z) Where a simple contract debt has been secured by deposit of title-deeds, and nothing has been said as to interest, the mortgagee is entitled to interest at the rate of £4 per cent. (a)

So also in the case of a mortgage, interest is payable up to the time when the debt is paid off, (b) and drawn bonds which remained unredeemed through the failure of the borrower to provide funds, were held to be redeemable only on payment of the principal with interest up to the time of payment. (c) Where

(r) *Pierce v. Fothergill*, 2 Sc. 334.(z) *Gibbs v. Fremont*, 9 Exch. 31;(s) *East of England Banking Co.*, 22 L. J. Ex. 302.*In re*, L. R. 6 Eq. 368.(a) *In re Kerr's Policy*, L. R. 8 Eq.(t) *Walker v. Barnes*, 5 Taunt. 240. 331.(u) *Marshall v. Poole*, 13 East, 101;(b) *Price v. Gt. Western Ry. Co.*, 16*Farn v. Ward*, 3 M. & W. 25.M. & W. 244; *Morgan v. Jones*, 8 Exch.(x) *Bruce v. Hunter*, 3 Campb. 467; 620.*Calton v. Bragg*, 15 East, 227.(c) *Gordillo v. Weguelin*, 5 Ch. D.(y) *Allen v. Harrison*, 3 Moore, 30. 287, C. A.

there was an agreement for a mortgage at £10 per cent, and the mortgagor covenanted to pay the principal at the end of one year, and interest meantime at £10 per cent, it was held that, after the year had expired, the interest was recoverable only as damages at £5 per cent. (*d*)

By the 3 & 4 Will. IV. c. 42, sect. 28, it is enacted that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue or any inquisition of damages, may, if they think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, (*e*) so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment. And the jury may also (sect. 29), if they think fit, give damages, in the nature of interest, over and above the sum recoverable, in all actions on policies of assurance made after the passing of the act. By the 1 & 2 Vict. c. 110, sect. 17, it is enacted that every judgment debt shall carry interest at the rate of £4 per cent per annum from the time of entering up the judgment. (*f*) It is not necessary that the day for the payment should be mentioned in the instrument; it is sufficient if a time or event is [* 1104] fixed, the date of which can be ascertained * afterward.

Therefore, where the plaintiff supplied furniture to the defendant on the written terms "one-third in cash, and bills at six and twelve months for the balance," it was held that the plaintiff was entitled to interest on the one-third from the time the goods were delivered. (*g*) A notice of a call on a contributory under a winding-up which stated that if the call is not paid at the time appointed, interest will be charged thereon, is a sufficient notice that interest will be claimed. (*h*) But in the case

(*d*) *In re Roberts*, 14 Ch. D. 49. But the higher rate may be contracted to be paid. See *Ex parte Furber*, 17 Ch. D. 191.

(*e*) As to what is a demand in writing, see *Ward v. Eyre*, 15 Ch. D. 130.

(*f*) *Newton v. Grand Junc., &c.*, 16 L. J. Ex. 276.

(*g*) *Duncombe v. Brighton Club Co.*, L. R. 10 Q. B. 371.

(*h*) *Ex parte Lintott*, L. R. 4 Eq. 184; *Barrow's case*, L. R. 3 Ch. 784.

of notes payable on demand, payment must be demanded, or interest will not begin to run, (*i*) and the demand must be made on the person liable to pay; a demand upon the trustee in bankruptcy is insufficient. (*i*) A policy of assurance does not bear interest, and interest is only payable under the statute where there has been a wrongful detention of the principal. (*k*) A written application for a loan till a fixed day is not an instrument by virtue of which money is payable within the 3 & 4 Will. IV. c. 42, sect. 28, so as to enable a jury to give interest as damages, though the loan is made on the terms of the application. (*l*)

Of Special Damages. — The general rule is that all damages which are the fair and natural result of the defendant's breach of contract, although arising out of special circumstances, may be recovered in the action brought against him, provided they must, in the ordinary course of things, have been expected to occur, or may fairly be considered to have been contemplated by the parties as the probable consequence of a breach of the contract. (*m*) If the contract has been made under special circumstances which were communicated and known to both parties, the damages they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances so known and communicated; but if the special circumstances were wholly unknown to the party breaking the contract, he can only be supposed to have had in his contemplation the amount of injury which would arise generally, and not from any special circumstances. (*n*) Thus where a cable was sold with a warranty, and the cable on trial did not answer the warranty, and was broken and lost, and the purchaser, relying on the warranty, had attached an anchor to the cable, and lost, consequently, both his anchor and cable, it was decided that the value of the anchor might be recovered * in addition to the price paid for the cable. (*o*) [* 1105]

(*i*) *Re Herefordshire Banking Co.*,
L. R. 4 Eq. 250.

(*k*) *Webster v. British Empire Ass.*
Co., 15 Ch. D. 169.

(*l*) *Taylor v. Holt*, 3 H. & C. 452;
sed quare.

(*m*) *Hadley v. Baxendale*, 9 Exch.
341; 23 L. J. Ex. 179.

(*n*) *Sully v. Duranty*, 3 H. & C. 270;
33 L. J. Ex. 319; *Burton v. Pinkerton*,
L. R. 2 Ex. 340; 36 L. J. Ex. 137.

(*o*) *Borradaile v. Brunton*, 2 Moore,
582; 8 Taunt. 535.

Where the defendant covenanted with the plaintiff that, if the plaintiff would surrender his lease, in order that a new lease might be granted to the defendant, the defendant would sink a pit on the land in search of coal, and, in case a marketable vein of coal should be reached, would pay the plaintiff £2500, and the pit was never sunk, and the defendant was sued for a breach of his covenant, and it was shown that marketable coal would probably have been found if the pit had been sunk, it was held that the whole £2500 were recoverable. (p) Where the defendant, in consideration of £10 paid by the plaintiff, promised to let to the latter an iron mill for the term of six months, and the plaintiff, relying on this promise, purchased and laid in a stock in trade, and the defendant then refused to let him the mill, and the jury, although £10 only had been paid by the plaintiff for the hire of the mill, and the mill was not worth more than £20 per annum to let out for hire, assessed the damages at £500, by reason of the plaintiff's loss in the purchase of his stock in trade, it was held that they were entitled so to do, and the court refused to interfere with their verdict. (q) Where the plaintiff, who was a large farmer, and was known by the defendant to be accustomed to thresh out his wheat in the field and send it off to market, gave an order to the defendant for a threshing machine, which was to be delivered on the 11th of August, at which time the wheat might reasonably be expected to be ripe, and the threshing machine was not ready, but was promised from time to time, and was not delivered before the middle of September, and it became necessary to stack the wheat out in the field, where it was damaged by a thunderstorm before it could be thatched, and had to be kiln-dried, it was held that the plaintiff was entitled to recover the damage he had sustained and the extra expense he had incurred, as the injury was such as might naturally be expected to result from the breach of contract, and ought to have been contemplated by the defendant as a probable consequence of failure on his part to

(p) *Pell v. Shearman*, 10 Exch. 766; (q) *Nurse v. Barnes*, T. Raym. see, however, *Wigsell v. School for Indigent Blind*, 8 Q. B. D. 357; *post*, p. *1107.

send the machine at the time appointed. (r) Where the defendants, a gas company, contracted to supply the plaintiff with a proper service-pipe from the main outside to a meter inside his premises, and the gas escaped from a defect in the pipe, and the servant of a gas-fitter, who happened to be working in an adjoining room, incautiously went into the shop with a lighted candle, and the escaped gas exploded, it was held that the defendants were liable * for all the damage done. (s) [* 1106] Where, on the sale of a chattel, the buyer intends it for a special purpose, but the seller supposes it is for another and more obvious purpose, the buyer can recover, as damages for the non-delivery according to the contract, the loss of profit which might have been made from the purpose supposed by the seller, provided the buyer has actually sustained damages to that or a greater amount. (t) Where the defendant had been guilty of a breach of contract in not repairing a steamship within the time stipulated for, it was held that he was liable to pay as damages the net profits which the owners might have obtained by chartering the vessel, if she had been delivered at the time fixed by the contract. (u) So where the defendant did not give possession under a lease to the plaintiff, whom he knew to be about to carry on a trade on the premises, he was held liable for the loss of trade. (v) Where the plaintiff had entered into a contract of subsale with respect to certain goods, and the defendant knew that the plaintiff had purchased them for resale, but did not know of any contract of resale, it was held that the plaintiff could not recover damages for loss of profit of resale. (x) Where, on the other hand, a miller delivered to a carrier the broken shaft of his mill to be carried for hire to an engineer, and the carrier negligently delayed the transmission and delivery of the shaft, and in consequence of the delay the mill was kept stand-

(r) *Smeed v. Foord*, 1 Ell. & Ell. 602; 28 L. J. Q. B. 178; *Prior v. Wilson*, 35 Law T. R. 549; 8 W. R. Q. B. 260.

(s) *Burrows v. The March Gas & Coke Co.*, L. R. 2 Ex. 67; ib. 7 Ex. 96; see *McMahon v. Field*, 7 Q. B. D. 591.

(t) *Cory v. Thames Ironwork Co.*, L. R. 3 Q. B. 181.

(u) *Trent & Humber Ship-building Co., In re, ex parte the Cambrian Steam Packet Co.*, L. R. 6 Eq. 396; ib. 4 Ch. 113.

(v) *Jacques v. Miller*, 6 Ch. D. 153; overruled on another point, see *Marshall v. Berridge*, 19 Ch. D. 233.

(x) *Thol v. Henderson*, 8 Q. B. D. 457.

ing idle, and the miller brought an action for damages against the carrier, and sought to recover compensation for the loss of the profits of his trade whilst the mill was stopped, through the default of the carrier, it was held that, in order to recover these damages, the miller should have communicated to the carrier the fact that he had no other shaft, and that his mill was necessarily stopped until the new shaft was put up; for the stoppage of the mill could not reasonably be contemplated by the carrier as the necessary and natural result of delay in the delivery of the broken shaft. (y) And the same principle of law was adopted in a case where a cotton-mill came to a standstill in consequence of delay by a carrier in delivering some cotton. (z) So where a contract had been entered into between the plaintiff and the defendant for the furnishing of a fire-box for [* 1107] the plaintiff * by a given time, and the article was not furnished within the time, and when it was furnished it was found to be utterly useless, and the plaintiff brought an action to recover the extra expense he had been put to in getting another fire-box, and sought to recover as special damage the damages he had been compelled to pay by reason of his inability to fulfil another contract, to which the contract for the fire-box was subsidiary, it was held that, as the plaintiff had not communicated to the defendant the serious consequences that would result if the fire-box was not furnished by the time appointed, he was not entitled to make them a ground of special damage. (a) And where the plaintiff sent goods from Manchester by a railway company to his traveller at Cardiff, and the delivery of the goods was, through the negligence of the company, delayed until after the traveller had left Cardiff, and the plaintiff, in consequence, lost the profits he would have derived from a sale at Cardiff, it was held that, in the absence of notice to the company of the object for which the goods were sent, the plaintiff could not recover from them such profits as damages for the delay. (b) So where a commercial traveller

(y) *Hadley v. Baxendale*, 23 L. J. H. & N. 408; *Fletcher v. Tayleur*, 25 Ex. 179; *Williams v. Reynolds*, 6 B. & L. J. C. P. 65.
S. 495; 34 L. J. Q. B. 221.

(a) *Portman v. Middleton*, 4 C. B.

(z) *Gee v. Lanc. & York. Ry. Co.*, N. S. 324; 27 L. J. C. P. 231.

(b) *Gt. Western Ry. Co. v. Red-*

delivered a parcel of samples to a common carrier to be carried to A, but did not state the contents of the parcel, or the purpose for which it was required, and by the negligence of the carrier the parcel was delayed, and the traveller spent three days at A unemployed waiting for it, it was held that the carrier was not liable to pay the hotel expenses of the traveller during the time he was waiting for the parcel, such damages being too remote. (c)

Where there has been a warranty that an animal is free from disease, and the plaintiff, trusting to that, has let the animal be with others which have become infected, the defendant is liable for all the loss, if he must reasonably have known what would happen. (d)

Where there was a covenant to build a wall, and there was a breach of the covenant, but the cost of building a wall would be greatly in excess of the damage from not building one, it was held that the cost of building the wall was not the true measure of damages, but the pecuniary amount of the difference between the position of the plaintiffs by the breach or by the performance. (e)

When the Cost of Previous Legal Proceedings may be recovered as Part of the Damages. — If an agent promises to execute a * commission for hire or reward, and breaks [* 1108] his promise, the general damage is the loss, injury, and inconvenience which immediately result from the non-execution of the thing agreed to be done. Special damages may arise and be recoverable, if the employer is himself only an agent acting on behalf of, and responsible to, a third party, and is sued by the latter, and has to pay damages and costs in consequence of the defendant's breach of contract. Thus where the plaintiff, a London broker, having received a commission from a merchant in Holland to purchase and ship from Porto Rico tobacco of the best quality, employed the defendant to execute the commission, and the defendant purchased and shipped a quantity of rotten tobacco of the very worst description, and the Dutch merchant

mayne, L. R. 1 C. P. 329; and see Hales v. The London & North-Western Ry. Co., 4 B. & S. 66.

(c) Woodger v. G. W. Ry. Co., L. R. 2 C. P. 318; 36 L. J. C. P. 177.

(d) Smith v. Green, 1 C. P. D. 92.

(e) Wiggell v. School for Indigent Blind, 8 Q. B. D. 357.

refused to accept it, and brought an action against the plaintiff, and recovered all the damages that he had sustained by reason of his not having received in Holland the tobacco the plaintiff had agreed to send him, and the plaintiff then sued the defendant, it was held that he was entitled to recover all the damages and costs he had paid to the merchant in Holland, and also his costs incurred in defending that action, the plaintiff undertaking to hand over the rotten tobacco to the defendant, or to sell it and account with him for the net proceeds thereof. (*f*) So if a principal who has employed an agent to make a contract, repudiates the contract made by the agent, or denies his liability, and the agent is himself sued and defends unsuccessfully, he may, in an action against his principal, recover the costs of his unsuccessful defence, if in defending the action he has pursued the course which a prudent and reasonable man would have done under the circumstances. (*g*) The defendant demised premises for a term of years to the plaintiff, and covenanted that the plaintiff should occupy the same during the term "without any interruption whatsoever from or by the defendant, his executors, administrators, or assigns, or any other person or persons lawfully claiming by, from, or under him or them." An action of trespass was afterward brought by a person claiming under the defendant against the plaintiff, who gave notice of it to the defendant, who paid no attention to the notice, and the plaintiff, acting on his own judgment, and without express authority, defended the action, in which a verdict was eventually found against him, and he was obliged to pay damages and costs. It was held that he was entitled to recover from the defendant the costs and damages he had paid, and also the expenses he had himself incurred in defending the action of trespass. (*h*) But the costs of previous legal proceedings [* 1109] * can only be recovered where they are the natural and proximate consequence of the breach of contract; (*i*)

(*f*) *Mainwaring v. Brandon*, 2 Moore, 125; 8 Taunt. 202.

(*g*) *Broom v. Hall*, 7 C. B. n. s. 503.

(*h*) *Rolph v. Crouch*, L. R. 3 Ex. 44; 37 L. J. Ex. 8; *Howard v. Lovegrove*, L. R. 6 Ex. 43.

(*i*) *Richardson v. Dunn*, 8 C. B. n. s. 655; 30 L. J. C. P. 47; *Pow v. Davis*, 1 B. & S. 220; 30 L. J. Q. B. 257; *Baxendale v. L. C. & D. Ry. Co.*, L. R. 10 Ex. 35, overruling *Mors-le-Blanch v. Wilson*, L. R. 8 C. P. 227; and see

and costs cannot be recovered which were incurred in upholding a defence manifestly untenable. (*k*)

Pecuniary Liabilities swelling the Amount of Damages. — A pecuniary liability incurred by the plaintiff in consequence of the breach of the defendant's contract may form part of the damages, though it may be difficult to estimate the extent of such pecuniary liability. Where the plaintiff, having purchased seed barley with a warranty, sold it again with a similar warranty, and the warranty was broken, and the sub-vendee claimed damages from the plaintiff, his immediate vendor, it was held that the jury ought to take this item of claim and liability on the part of the plaintiff into their consideration in estimating the amount of the damages. (*l*) But where a purchaser buys goods ordinarily procurable in the market, and before he has received them sells them again, and the goods are not delivered by the first vendor, and the purchaser fails to deliver them to his vendee, he cannot charge the damages paid to the latter against the first vendor if it appears that he had the means of fulfilling his sub-contract by going into the market and supplying himself with the article and delivering it to his vendee. (*m*)

Where a tenant holds over after a notice to quit, or after the expiration of his lease, and the landlord is compelled to pay damages to a party to whom he had contracted to let the land, these damages will be recoverable from the obstructive tenant. (*n*)

Reduction of Damages.¹ — In estimating the damages sustained by a breach of contract, the defendants are not entitled to bring into account the amount which the plaintiff may have received under a policy of insurance. (*o*) So in an action for breach of contract for the quick discharge of a ship made with several persons jointly, where some of the plaintiffs had made

¹ See *Van Epps v. Harrison*, 5 Hill (N. Y.), 63, 40 Am. Dec. 314, and elaborate note discussing the subject of recoupment, ib. 320.

Fisher v. Val de Travers Co., 1 C. P. D. 511; *Hornby v. Cardwell*, 8 Q. B. D. 329. (*m*) *Maule, J., Peterson v. Ayre*, 13 C. B. 365; *Josling v. Irvine*, 30 L. J. Ex. 78; 6 H. & N. 512.

(*k*) *Ronneberg v. Falkland Islands Co.*, 17 C. B. n. s. 1; 34 L. J. C. P. 34. (*n*) *Bramley v. Chesterton*, 2 C. B. n. s. 592.

(*l*) *Randall v. Raper*, El. Bl. & El. 84; 27 L. J. Q. B. 266. (*o*) *Bradburn v. Great Western Ry. Co.*, L. R. 10 Ex. 1.

profits by reason of such breach of contract, which they would not otherwise have made, through another ship in which they were interested having been substituted for the purpose for which the former ship was required, it was held that [* 1110] the amount of the joint damages * could not be reduced by the profits so made by some of the plaintiffs individually. (*p*)

Excessive Damages.¹ — It is a general rule of law that the indemnity to be recovered in respect of damages sustained by reason of a breach of contract shall be fairly proportioned to the real injury sustained; and the court will not permit a defendant to be mulcted in excessive damages. It is a rule, also, that a catching bargain shall not be taken advantage of, so as to enable the plaintiff to put into his pocket a greater sum of money than will form a fair and reasonable compensation for the injury he has sustained by the breach of contract. Thus where the defendant bought a horse of the plaintiff, and agreed to pay, as the price of the horse, "a barleycorn a nail for each nail in the horse's shoes, doubling every nail," and there were thirty-two nails in every shoe, and the plaintiff, after doubling every nail, and reckoning the entire amount, claimed five hundred quarters of barley as the price of the horse, which the defendant refused to pay, Hyde, J., directed the jury to give no more than the actual value of the horse as damages; and they accordingly gave the plaintiff £8, which was held to be good. (*q*)

Penal Obligations. — In ancient times, penalties were commonly resorted to, to secure the performance of contracts; and parties frequently bound themselves by penal obligations in heavy sums, to be paid in case they did not perform such and such covenants, or did, or omitted to do, certain specified acts or things. Much hardship was frequently sustained from these penalties; for all the material parts of a contract might be performed, yet, if the contract had not been literally fulfilled in

¹ 2 Sedgw. Meas. Dam. c. 26; Sedgw. Lead. Cas. Meas. Dam. 738; Eggleston, Dam. c. 41; Field, Dam. c. 37.

(*p*) *Jebson v. East & West India Dock Co.*, L. R. 10 C. P. 300. *Thornborow v. Whitacre*, 2 Ld. Raym. 1164; *Chesterfield v. Jansen*, 1 Wils. 286.

(*q*) *James v. Morgan*, 1 Lev. 111; 286.

every particular, — if every one of a variety of things stipulated to be done was not done, either at the exact time or in the exact manner, or with all the circumstances specified, according to the literal terms of the engagement, — the whole penalty became forfeited and payable at common law, although the real damage sustained by the particular breach of contract complained of might be of the most trifling and contemptible character. Parties, consequently, who had incurred these forfeitures, and had become liable to the payment of these penalties, had often a strong claim in equity for relief; (r) and the lord chancellor, from a very early period, granted injunctions to restrain plaintiffs from issuing execution upon judgments obtained in the courts of common law for such penalties, and directed an issue to try, by the verdict of * a jury, the amount [* 1111] of actual damage sustained, which damage, when assessed, the party was allowed to recover, but nothing farther. (s)

Subsequently, the legislature, by the 8 & 9 Wm. III. c. 11, sect. 8, has extended to defendants a reasonable relief and protection from penalties, by requiring the plaintiff in all actions upon any bond or any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing contained, to assign breaches, and the jury, upon the trial, to assess the damages that the plaintiffs have sustained thereby, (t) which damages only are to be recovered; but judgment for the amount of the penalty is to be entered and to stand as a farther security to answer to the plaintiff such damages as may be sustained from farther breach of any covenants in the same indenture, deed, or writing contained.

Penalties for Breach of Contract. — This statute embraces all penalties established to secure the performance of contracts, and is in all cases compulsory upon plaintiffs. "It is not in the power of a plaintiff to refuse to proceed according to the statute; he must assign the breach of such covenants as he proceeds to recover satisfaction for; and if the defendant pleads to issue, and the cause goes to a jury for trial, the jury upon trial of such

(r) Mellish, L. J., *Ex parte Hulse*,
L. R. 8 Ch. 1022.

(s) *Hardy v. Martin*, 1 Cox, 26; *Roy v. Duke of Beaufort*, 2 Atk. 191.

(t) 3 & 4 Wm. IV. c. 42, sect. 16.

cause must assess damages for such of the breaches assigned as the plaintiff, upon trial of the issues, shall prove to have been broken." (*u*). The statute, it will be seen, refers simply to penalties for the non-performance of contracts, and does not extend to any bond conditioned for the mere payment of money. Bail bonds, replevin bonds, post-obit bonds, and all bonds conditioned for the payment of a sum certain, at a day certain, are not within the statute; (*x*) but bonds for the payment of annuities, and of sums of money by instalments have been held to come within its provisions. (*y*) Where, a debt being payable by instalments, with interest, the debtor made default in payment of one of the instalments, and by a deed reciting that the creditor agreed to give the debtor time upon having the payment of the debt secured to him with interest, "by the instalments and in manner hereinafter appearing," provision was made for payment of the debt, with interest, by instalments different from the former ones,

with a proviso that, upon default being made in payment of any instalment, the whole unpaid portion of the debt, with interest, should become immediately payable, and the debtor made default, it was held that the proviso was not in the nature of a penalty, and that the creditor ought not to be restrained from enforcing immediate payment of the whole of the money remaining due. (*a*) So where a creditor agreed with his debtor to remit part of the debt upon having a mortgage to secure the payment of the balance within two years, without prejudice to his right to recover the whole debt if such balance was not paid within that time, and the debtor executed a mortgage for such balance, containing a proviso that, if the mortgage debt was not paid within the two years, the whole of the original debt should be recovered, and the debt was not paid within the two years, it was held that the proviso was not of

(*u*) *Hardy v. Bern*, 5 T. R. 540, 636.

(*x*) *Smith v. Bond*, 3 M. & Sc. 528; *James v. Thomas*, 5 B. & Ad. 40; 1 Saund. 48, n. (*b*).

(*y*) *Willoughby v. Swinton*, 6 East, 550; *Walcot v. Goulding*, 8 T. R. 126. A warrant of attorney conditioned for the payment of money by instalments, or

to secure the payment of an annuity, is not within the statute. *Cox v. Rodbard*, 3 Taunt. 74; *Shaw v. Worcester*, 4 M. & P. 21.

(*a*) *Sterne v. Beck*, 1 De G. J. & S. 595; *Protector Loan Co. v. Grice*, 5 Q. B. D. 592, C. A.

the nature of a penalty from which the mortgagor was entitled to be relieved, and that the mortgagee could recover the whole debt. (b)

In an action upon a bond conditioned for the performance of covenants or collateral acts, the obligee cannot recover more damages against the obligor, for a breach of the condition of the bond, than the amount of the penalty and costs: for the bond ascertains the extent of the damage by consent of the parties; and, therefore, if a bond be conditioned for the performance of any act, and the obligee, by reason of the obligor's non-performance, sustains a damage far exceeding the amount of the penalty, yet he can only recover to the extent of the penalty and costs. (c) But where the penalty is contained in a deed *inter partes* or an agreement, damages may be recovered beyond the penalty. When the performance of a covenant or agreement is secured by a penalty imposed in the contract itself, the plaintiff may, at his election, bring an action for the penalty, and recover the penalty (after which he cannot resort again to the covenants, because the penalty is to be a satisfaction for the whole); or, if he does not choose to go for the penalty, he may proceed upon the covenants, and recover more or less than the penalty *toties quoties*. (d) If he proceeds and recovers judgment for the penalty, he, of course, subjects himself to the restrictions imposed by the 8 & 9 Wm. III. as to issuing execution upon such judgment, and must take the opinion of a jury as to the amount that he ought, under the circumstances, to be permitted to levy. But if he rejects the penalty, and proceeds for his real damages, he may recover a sum larger in amount than the *penalty, if the jury think [* 1113] him entitled to it. (e) A bond of indemnity given to protect a purchaser of land against adverse claims threatened at the time of the purchase, was held to be valid to the full amount of the penal sum, which greatly exceeded the original purchase-money, there being no equity in the circumstances of the case to justify an interference with the legal right, and the purchaser

(b) *Thompson v. Hudson*, L. R. 4 *Hurst v. Hurst*, 4 Exch. 579; and see H. L. 1. *Legh v. Lillie*, 6 H. & N. 170, n.

(c) *Wilde v. Clarkson*, 6 T. R. 304.

(e) *Winter v. Trimmer*, 1 W. Bl.

(d) *Lowe v. Peters*, 4 Burr. 2228; 395; *Harrison v. Wright*, 13 East, 343.

having, in discharge of the claim and expenses incident thereto, expended a larger sum than the full amount of the penal sum named in the bond. (*f*)

Liquidated Damages.¹—But a sum *in solido*, fixed upon by the parties and limited to be paid by the one to the other as a

¹ Upon the general subject of liquidated damages, penalties, and penalties under the name of liquidated damages, consult 2 Sedgw. Meas. Dam. c. 16; Sedgw. Lead. Cas. Meas. Dam. 427; 1 Suth. Dam. c. 7, sect. 6; Field, Dam. c. 9; Eggleston, Dam. c. 39.

Whether a clause in a contract is to be construed as allowing liquidated damages, or only a penalty, see U. S. Dig. tit. *Damages*, I. 5; *Hardee v. Howard*, 33 Ga. 533; *Sutton v. Howard*, ib. 536; *Peine v. Weber*, 47 Ill. 41; *Jemmison v. Gray*, 29 Iowa, 537; *Henderson v. Cansler*, 65 N. C. 542; *Shute v. Hamilton*, 3 Daly, 462; *Lee v. Overstreet*, 44 Ga. 507; *Davis v. Hendrie*, 1 Mon. T. 499; *Smith v. Coe*, 33 N. Y. Superior Ct. 480; *O'Donnell v. Rosenberg*, 14 Abb. Pr. n. s. 59; *First Orthodox Cong. Ch. v. Walrath*, 27 Mich. 232; *Hook v. Fink*, 19 Minn. 407; *Greer v. Kleen*, 13 Abb. Pr. n. s. 437; *Taylor v. The Marcella*, 1 Woods, 302; *Lyman v. Babcock*, 40 Wis. 503; *Savannah, &c. R. R. Co. v. Callahan*, 56 Ga. 331; *Dulaghan v. Fitch*, 42 Wis. 679; *Wilcus v. Kling*, 87 Ill. 107; *Ivinson v. Althrop*, 1 Wy. T. 71; *De Lavallette v. Wendt*, 75 N. Y. 579; *Birdsall v. Twenty-Third Street Ry. Co.*, 8 Daly, 419; *Muse v. Swayne*, 2 Lea, 251; *Louis v. Brown*, 7 Oreg. 326.

Recent cases: Where a person has bound himself in a certain sum to do or not do a certain thing, the court will look at the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated; and from the whole decide whether equity and good conscience require that such sum shall be treated as liquidated damages or only as penalty. *Gillis v. Hall*, 2 Brews. 342, 7 Phila. 422; *Hamaker v. Schroers*, 49 Mo. 406.

If a sum stipulated to be paid, on a breach, is termed a "penalty," it will be treated only as a penalty; but if it is termed "liquidated damages," it may be treated as a penalty, notwithstanding, if that appears to be the intent. *White v. Arleth*, 1 Bond, 319.

The phrase "liquidated damages" does not always control the court in the construction of contracts, with a view of ascertaining the damages to which a party may be entitled; but, on the contrary, such language, embodied in a contract, has often been disregarded, and the subject-matter about which the contract is made, and the intention of the parties, — the legitimate elements in the interpretation of all contracts, — are resorted to for the purpose of ascertaining the loss or damage the party has really sustained. *Hahn v. Hortsman*, 12 Bush, 249.

Where a contract itself calls damages allowed on failure to perform, "liquidated damages," they must be so considered, unless such construction is inconsistent with other parts of the instrument, or is unreasonable in itself. *So held*, as to a contract to ship to a factor who had made advances, five hundred bales of cotton, and to pay, "as liquidated damages," two dollars per bale for every bale less than five hundred the consignor might fail to ship. *Williams v. Vance*, 9 S. C. 344.

If a contract by which an employer engages an employee for a term of years, at

(*f*) *Osborne v. Eales*, 2 Moo. P. C. n. s. 125.

compensation for a breach of contract, is not necessarily a penalty, such as courts of equity would have relieved against, or such as comes within the operation of the 8 & 9 Wm. III. c. 11. If the damages accruing from a breach of contract are of an uncertain nature, and the parties have chosen to assess and fix them beforehand by agreement amongst themselves, and the amount agreed upon is no more than what may be a fair and reasonable measure of damages, it is not a penalty within the meaning and operation of the statute, although it is denominated a "penal sum." "A man in possession of an estate in the country," observes Lord Eldon, "may set his own value upon the view, the timber, or other ornaments and conveniences of the property; and if he parts with the possession, he may part with it on the terms that a tenant shall use it or cultivate it in a particular way, or pay a

a stated salary, provides a round sum as liquidated damages for a breach, this should be construed as a penalty; for it is not reasonable that the same sum should be claimed for a breach early in the term, as for one near its close. *Ex parte Polard*, 17 Bankr. Reg. 228. Compare *Re Pevear*, 17 Bankr. Reg. 461.

Where there are several covenants or stipulations in an agreement, the damages for the non-performance of some of which are readily ascertainable by a jury, and the damages for the non-performance of the others are not measurable by any exact pecuniary standard, and a sum is named as damages for a breach of any of the covenants or stipulations, such sum is held to be merely a penalty. *Trower v. Elder*, 77 Ill. 452.

A sum inserted by the parties to a contract as compensation for a breach, if manifestly exceeding the amount of injury suffered therefrom, will be regarded merely as a penalty. *Scofield v. Tompkins*, 95 Ill. 190.

Where the parties to a contract stipulate for the payment of a large sum of money as damages for the failure or non-payment of a smaller sum at a given time, no matter what may be the language of the parties, the large sum agreed upon will be deemed a penalty, and not liquidated damages. *Morris v. McCoy*, 7 Nev. 399. The sum agreed upon between the parties will always be held to be a penalty, where the agreement is such that it secures the performance or omission of various acts, some of which are not readily measurable by any exact pecuniary standard, together with others in respect of which damages on the breach of the covenant are certain, or readily ascertainable by a jury. *Morris v. McCoy*, 7 Nev. 399.

Where an agreement contains several stipulations of different degrees of importance, and a sum is named as liquidated damages, an intention to make the sum so determined payable on the breach of minor and unimportant parts of the agreement, will not be imputed in the absence of language declaring such intention with precision. *Hoagland v. Segur*, 38 N. J. L. 230.

The insertion of a penal clause in a contract does not restrict the party aggrieved by a breach to the relief afforded by the penalty. *Noyes v. Phillips*, 60 N. Y. 408, 16 Abb. Pr. n. s. 400.

Providing, in a contract, for the payment of certain damages for a breach of it, does not amount to a waiver of any other damages to which a party might be entitled. *Nowlin v. Pyne*, 40 Iowa, 166.

large sum of money as a compensation for the damage or injury occasioned by his neglect. He may put an extraordinary value upon a particular piece of land or wood, on account of the amusement it may afford him; and if he chooses to stipulate for £5 or £50 additional rent upon every acre of furze broken up, or for any given sum of money upon every load of wood cut and stubbed up, I see nothing irrational in such a contract." (g) Where, therefore, there was a reservation of an additional rent of £5 per acre for every acre of meadow land which the tenant should break up or convert into tillage, and of £50 for every acre of arable land which should not be laid down for grass, and so kept, it was held that the landlord was entitled to the increased rent for every acre dealt with contrary to the stipulations of the lease. (h) And where a tenant covenanted not to sow more than seventy acres

in one year with clover, or if he did so, to pay an additional rent of £10 per acre, it was * held that such additional rent was not a penalty. (i) Where a contract for the sale of land provided that the purchaser should pay interest on the purchase-money at £4 per cent, from the time of taking possession until the 1st of July, 1858, the day appointed by the contract for the payment of the purchase-money, and after that day at £5 per cent, if the purchase-money should not then be paid, and after the 1st of January, 1859, at £8 per cent, with a proviso that this should not give the purchaser the right to delay the payment of the purchase-money on paying such higher rate of interest, and the purchaser took possession of the land in 1857, but, owing to circumstances not caused by the misconduct or negligence of the vendor, the purchase was not completed until 1865, it was held that the stipulation for payment of a higher rate of interest was not in the nature of a penalty to secure the punctual payment of the purchase-money, against which the purchaser was entitled to be relieved, but a separate and distinct contract which he was bound to perform. (k)

(g) *Astley v. Weldon*, 2 B. & P. 351.

(i) *Jones v. Green*, 3 Y. & J. 304;

(h) *Birch v. Stephenson*, 3 Taunt.

Pollitt v. Forest, 16 L. J. Q. B. 424;

469; *Rolfe v. Peterson*, 2 Bro. P. C.

Bowers v. Nixon, 18 ib. 35.

436; *Denton v. Richmond*, 1 Cr. & M.

(k) *Herbert v. Salisbury & Yeovil*

734; *Farrant v. Olmias*, 3 B. & Ald.

Ry. Co., L. R. 2 Eq 221.

692.

In cases, also, influencing and affecting the personal feelings and affections, the amount of damages which ought to be awarded by way of compensation cannot easily be measured by the taste or judgment of third parties; it is often such as the persons interested can alone correctly estimate; and they are permitted, when that is the case, to calculate and fix them beforehand, at a precise sum to be paid as liquidated damages. If a man seals and delivers a written promise of marriage, whereby he promises to marry a particular lady, and in default to pay her the sum of £1000, "that very sum is the ascertained damage, and the jury are confined to it." (*l*) If a deed or agreement contains covenants or promises for the performance of various acts and duties, and then provides for the payment of one large sum, such as £1000, by way of compensation, in case of the non-performance of all or of any one of the things stipulated to be done, and the damages in every case of non-performance are altogether uncertain, the sum agreed to be paid will be treated as liquidated damages, and not as a penalty. Thus where in a deed of copartnership between the plaintiff and defendant, as surgeons, the defendant covenanted that after the determination of the copartnership he would not, at any time, practise as a surgeon within two miles and a half of Dorset Crescent, and would not prevail on any of the patients of the firm to withdraw from the plaintiff or employ any other medical man, but would, as far as was in his power, promote the business of the plaintiff, and that if he infringed the covenant in any respect he *would pay to the plaintiff [*1115] £1000 as liquidated damages, it was held that, as the damages resulting from the breach of these different stipulations were altogether uncertain, and very difficult to reduce to a pecuniary standard, the parties had a right to measure them for themselves, and settle the amount to be paid for a breach of all or any one of the stipulations. (*m*) And the same point was decided in the case of a deed of dissolution of copartnership between the plaintiff and defendant, as attorneys; (*n*) also where a defendant

(*l*) *Lowe v. Peers*, 4 Burr. 2229.

Irving, Ell. Bl. & Ell. 563; 27 L. J.

(*m*) *Atkins v. Kinnier*, 4 Exch. 784; Q. B. 291.

19 L. J. Ex. 132; *Leighton v. Wales*, 3

(*n*) *Galsworthy v. Strutt*, 1 Exch.

M. & W. 545; *Reynold v. Bridge*, 6 Ell. 663; 17 L. J. Ex. 226.

& Bl. 528; 26 L. J. Q. B. 12; *Mercer v.*

covenanted not to carry on the trade of a perfumer, toyman, and hair merchant, within the cities of London and Westminster, or within the distance of six hundred miles from the same respectively, and for the observance of the covenant did bind himself to the plaintiff in the sum of £5000 as and by way of liquidated damages; (o) and where, in an agreement between the plaintiff and defendant for the sale, to the plaintiff, of the lease and goodwill of a tavern, called the Blenheim Tavern, it was stipulated that the defendant should not thenceforth be in any way concerned in carrying on the trade of a licensed victualler within one mile of the Blenheim Tavern, under the penal sum of £500, to be recovered as liquidated damages. In cases of this sort, the claim for damages depends not only on things which have been done, which are difficult of proof, but on what may be done, which it is impossible to prove, on the value of the customers which the vendor of the lease has attached to him, and on the number which his future conduct of the house which he has taken may draw to him. (p) On a guarantee that a vessel should sail with or before any other vessel then in the berth "under penalty of forfeiting one half of the freight," another vessel having sailed first, it was held that "one half of the freight" was recoverable as liquidated damages; and that it was immaterial whether the money intended to be made payable was called by the parties a penalty or liquidated damages. (q)

Where the obligee of a bond bound himself to complete certain smith's work in a church in a limited time, and in default to forfeit and pay £10 for every week after the expiration of the time limited for the doing thereof, until the work should be completely finished, it was held that the £10 a week was recoverable as liquidated damages. (r) Whether the sum [* 1116] provided to be paid is * to be treated as a penalty, or as liquidated damages, is a question of law to be decided by the judge upon a consideration of the whole instrument. (s)

(o) *Price v. Green*, 16 M. & W. 346; (r) *Fletcher v. Dyche*, 2 T. R. 36;
16 L. J. Ex. 108. *Duckworth v. Alison*, 1 M. & W. 412;

(p) *Crisdee v. Bolton*, 3 C. & P. 243. *Legge v. Harlock*, 12 Q. B. 1015.

(q) *Sparrow v. Paris*, 7 H. & N. 594; (s) *Sainter v. Ferguson*, 7 C. B. 727.
31 L. J. Ex. 137.

Penalties under the Denomination of Liquidated Damages. —

If a contract contains stipulations for the performance of divers things, and the damages resulting from the non-performance of some of them are capable of being measured by a precise sum, and one sum is stipulated to be paid in respect of the non-performance of the contract generally, that sum is a penalty, although the parties may choose to call it liquidated damages, and even expressly declare that it is not a penalty. "Since the 8 & 9 Wm. III. c. 11, parties, in framing agreements, have frequently changed the word penalty for liquidated damages; and the mere alteration of the term cannot alter the nature of the thing." If the sum, by whatsoever name called, is in point of fact a "penalty," the court will treat it as such; and the stipulation that it shall be recovered as liquidated damages will not prevent the party from insisting on the compulsory provisions of the statute as to assessing the damages. "There is one case," observes *Chambre, J.*, "in which the sum agreed for must always be considered a penalty; and that is where the payment of a smaller sum is secured by a larger."

Where by articles of agreement between the plaintiff and defendant, the former was to pay the latter £1 11s. 6d. per week, and her travelling expenses, and the defendant was to perform at his theatres, and conform to the several rules and regulations of the theatres, and pay all fines that might become payable, and it was agreed "that either of the parties neglecting to perform that agreement should pay to the other of them the sum of £200," it was held that the £200 was a penalty; for if the £1 11s. 6d. was not paid, or the travelling expenses were not paid, or a half-crown fine was not paid, the whole £200 would be recoverable. The effect of the agreement, therefore, was to give the plaintiff his option either to proceed upon the agreement *toties quoties*, or upon the first breach to proceed at once for the £200, out of which he might be satisfied for the damages actually sustained, and which might stand as a security against future breaches. (t) And where articles of agreement had been entered into between the plaintiff and the defendant for the sale and purchase of the goodwill of a surgeon's business, and the

(t) *Ashley v. Weldon*, 2 B. & P. 352, 353.

lease of his house, for £800, and the stock in trade and fixtures for £170 4s., and amongst various other stipulations it [*1117] was provided that the £170 4s. should be paid *by certain bills of exchange in manner therein mentioned, "and for the true performance of the agreement the defendant and plaintiff did bind and oblige himself unto the other of them in the penal sum of £500, to be recoverable for the breach of the said agreement as and by way of liquidated damages," it was held that the sum named was a penalty; for if any part of the sum secured by the bills, however small, remained unpaid, the whole £500 would be recoverable; and wherever the payment of a smaller sum is secured by a larger, the latter sum must be considered a penalty. (u)

By articles of agreement between the plaintiff and the defendant, the latter agreed to act at Covent Garden Theatre for four seasons, and to conform to the usual regulations of the theatre, and the plaintiff agreed to pay him £3 6s. 8d. a night; and it was agreed that, if either of them should neglect to fulfil the agreement, or any stipulation therein, such party should pay to the other £1000, to which sum it was agreed that the damages sustained by any such neglect or refusal would amount, and which sum was thereby declared to be the liquidated and ascertained amount of the said damages, and not a penalty or penal sum, or in the nature thereof; but it was held that the sum so agreed to be paid was nevertheless a penalty, and that the parties could not change the *thing* by changing the *name*. "It is certainly difficult," observes Tindal, C. J., "to suppose any words more precise or explicit than those used in the agreement, declaring that the sum of £1000 should be taken as liquidated damages, and not as a penalty. . . . But the clause is not confined to any single breach. If, on the one hand, the plaintiff neglected to make a single payment of £3 6s. 8d. per night, or, on the other hand, the defendant refused to conform to any usual regulation of the theatre, it must be contended that the clause in question, in either case, would have given the stipulated damages of £1000. But that a very large sum should become immediately payable, in consequence of the non-payment of a very

(u) *Davies v. Penton*, 6 B. & C. 233.

small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms, the case being precisely that in which courts of equity have always relieved, and against which courts of law have also in modern times endeavored to relieve, by directing juries to measure and assess the damages actually sustained by the breach of the agreement." (x)

By articles of agreement under seal, the defendant covenanted * to demise to the plaintiff two messuages, [* 1118] the indenture to contain certain specified covenants and provisos, and all other usual and reasonable covenants; and the plaintiff covenanted to accept the lease upon the terms specified, and to execute a counterpart thereof, and to pay the expenses of the lease and counterpart; "and for the true performance of the agreement each of the parties bound himself unto the other in the penal sum of £500, to be recovered against the defaulter as liquidated damages;" and it was held that the £500 must be considered as a penalty; for the forfeiture would not only attach on the defendant's refusal to grant the lease, but also on the plaintiff's refusal to pay the expenses of preparing the lease and counterpart. (y)

Pothier, in his Treatise on the Law of Obligations, remarks that, although a penalty or sum *in solido* is agreed to be paid for the very purpose of avoiding a discussion as to the amount of the damages which have been sustained, yet, being stipulated in lieu of damages, it is contrary to its nature to be carried beyond the limits which the law respecting damages prescribes; and as the French law does not permit them to exceed double the value of the subject-matter of the contract, the judge ought to moderate an excessive penalty to which the one party has inconsiderately submitted, when the other has suffered no real injury, or one much below the amount stipulated to be paid. The party making default cannot, certainly, he observes, however excessive the sum agreed to be paid may be, dispute his having intended to oblige himself to the extent named, when

(x) *Kemble v. Farren*, 6 Bing. 141; *Westbury, Thompson v. Hudson*, L. R. 3 M. & P. 440; *Betts v. Burch*, 4 H. & 4 H. L. 30; *In re Newman*, 4 Ch. D. N. 506; 28 L. J. Ex. 267; *Dimech v. 724*, C. A.
 Corlett, 12 Moo. P. C. 220; see *per Lord* (y) *Boys v. Ansell*, 7 Sc. 364.

the clause of the contract is express to that effect; for *ubi est evidens voluntas, non relinquitur præsumptioni locus*; but he may have entered into the contract, in the first instance, with the most perfect honesty of intention, and a firm determination to carry it fully and completely into effect, but with an erroneous confidence in his own powers of performance; and the equity which ought to prevail in all mutual contracts entered into for the common benefit of both parties does not permit the one to make a profit, and unconscientiously to enrich himself, at the expense of the other. An excessive penalty or fixed sum, agreed to be paid in lieu of damages, ought therefore, he says, to be reduced to what the damages resulting from the non-performance of the contract amount to, at the very highest. (z) If, again, he observes, a penalty has been imposed, or a sum *in solido* agreed to be paid, as the ascertained damage resulting from a breach of contract, and such contract has been partially performed, the party ought not to receive the whole penalty.

Ulpian decides that, although in strictness of law [* 1119] * the whole penalty has been incurred, nevertheless it is equitable that it should be so only in proportion to the part of the principal obligation which remains to be performed, the true reason being that, the penalty or liquidated sum being considered as a compensation for the non-performance of the principal obligation, the party seeking to enforce the contract cannot have both the one and the other. (a)

Parties to be made Plaintiffs in Actions for Damages for Tort founded on Contract.—Where a contract creates a duty, the neglect to perform that duty, as well as the negligent performance of it, is a ground of action for a tort. Both the nonfeasance and the misfeasance constitute a wrongful act, for which the remedy is by action of contract or of tort, at the option of the party injured. (b) Whenever the goods and chattels or materials of an employer are placed in the hands of a workman to be worked upon, any loss or injury to the chattels and materials,

(z) Poth. (*OM.*), No. 346, p. 192, ed. Dupin.

(a) Dumoulin de Divid. et Individ., p. 3, n. 112.

(b) *Boorman v. Brown*, 3 Q. B. 526; 11 Cl. & Fin. 1.

from the negligent execution of the work, forms a ground of action upon a tort as well as upon a contract. So if I deliver goods to a carrier to be carried for hire, and the goods are lost or injured through the negligent performance of the work of carrying, an action of contract or of tort is maintainable against the carrier, at the option of the owner of the goods. (c)

But it is said to be a rule of law that, whenever a wrong is founded upon a breach of contract, the plaintiff who sues in respect thereof must be either a party or privy to the contract, in order to establish a duty on the part of the defendant towards the plaintiff, and show a wrong done to the latter. (d) Thus where the defendant had contracted with the Postmaster-General to supply a certain number of stage-coaches, and keep them in good working order and condition, and fit for the road, and through his neglect to do the necessary repairs, one of the coaches broke down and injured the coachman, it was held that the coachman could not maintain an action against the coachmaker, as the negligence and breach of duty on the part of the coachmaker were grounded purely upon a breach of contract, and the coachman was neither a party nor privy to that contract. (e) So where a person sent his luggage with his servant by a railway, and himself went by a later train, and the railway company received the luggage as the servant's, it was held that the master could not sue for its loss. (f) But every person who exercises an *employment is bound, as we have seen, [* 1120] to take especial care to do his work so as not to injure another by the negligent performance of that work, whether what he does is done merely to please himself, or by virtue of a contract made with another. If materials furnished to a workman to be manufactured or worked upon are injured by the negligent execution of the work, the owner of the materials, or the person who furnished them to the workman, is the person to be made plaintiff in an action for the neglect of duty; but if the

(c) *Coggs v. Bernard*, Smith's L. C., 6th ed., 177. *eter Ry. Co.*, 8 Ell. & Bl. 1049; 27 Law J. Q. B. 167; *Heaven v. Pender*, 9 Q. B. D. 302.

(d) *Tollit v. Sherstone*, 5 M. & W. 288.

(e) *Winterbottom v. Wright*, 10 M. & W. 115; *Blackmore v. Brist. & Ex-*

(f) *Becher v. Great East Ry.*, L. R. 5 Q. B. 241.

person or the property of a stranger is injured by the negligent execution of the work, the injured stranger is the person to be made plaintiff.

Every person who enters upon the performance of the work of carrying merchandise or passengers is bound to exercise due and proper care and skill in the performance of the work, whether the work is done under a contract or gratuitously; (*g*) and every person who has been injured by the negligent performance of the work of carrying is entitled, as we have seen, to an action against the carrier, although he is no party to the contract under which the work was done. (*h*)

There are other cases, also, in which a third person, though not a party to a contract, may sue for the damage sustained if it be broken. As, for example, if an apothecary administers improper medicines to his patient, or a surgeon unskilfully treats him, and thereby injures his health, the apothecary and the surgeon will be liable to the patient, although the father or friend of the patient may have been the contracting party with the apothecary or surgeon; for though no such contract had been made, the apothecary, if he gave improper medicines, or the surgeon, if he took him as a patient and unskilfully treated him, would be liable to an action for misfeasance. (*i*)

SECTION II.

SPECIFIC PERFORMANCE.¹⁰⁶

Of Specific Performance of Contracts.¹—There are very many cases in which money compensation for a breach of contract

¹ Full accounts of the American law of equitable enforcement of specific performance of contracts are given in Waterman, *Specific Performance of Contracts*

(*g*) See *Austin v. Gt. West. Ry. Co.*, L. R. 2 Q. B. 442. (*i*) *Parke, B., Longmeid v. Holliday*, 6 Exch. 767; *Gladwell v. Steggall*, 8 Sc.

(*h*) *Collett v. Lond. & North-West. Rail. Co.*, Marshall *v. York, &c.*, *ante*, Smith on Negligence, p. 6. p. * 522.

affords *a very inadequate remedy, and one which [*1121] falls far short of what complete justice requires; and the Court of Chancery, from a very early period, in the exercise of its equitable jurisdiction, enforced the specific performance of contracts in cases where damages at law would not have afforded a complete remedy. (a) In the case of contracts for the purchase and sale of lands, estates, and houses, the court will compel the vendor to convey the estate agreed to be sold to the purchaser, and to enter into all the usual covenants for title, and will compel the purchaser to pay the purchase-money, whether the price has been ascertained and fixed by the parties themselves, or whether it has to be determined by valuation, (b) it being considered that compensation in damages is not an adequate remedy, and that the purchaser ought to have the estate which he has agreed to buy, and the vendor to sell; (c) whilst in the case of contracts for the sale of corn, wine, hops, sugar, and of merchandise in general, and all such things as can be readily purchased in the open market, the court refuses to interfere, because it is obvious that in such cases the money which will buy the article affords the speediest and best compensation that can be given to the purchaser, (d) unless the chattel is of a peculiar character, having a *pretium affectionis*, such as a statue, a picture, the Pusey horn, or the silver tobacco-box, mentioned subsequently, when the court will compel the vendor to deliver to the purchaser the very identical article agreed to be sold, (e) unless it appears that the price given was wholly inadequate, and that the purchaser had taken some unfair advantage of an

(1881); Pomeroy, *Specific Performance of Contracts* (1879). See, further, U. S. Dig. tit. *Specific Performance*; *Norton v. Preston*, 15 Me. 14, 32 Am. Dec. 128, and note, ib. 129; *Atwood v. Cobb*, 16 Pick. 227, 26 Am. Dec. 657, and note, ib. 661; *Anderson v. Green*, 23 Am. Dec. 417, and note, ib. 423. The doctrine not applicable to agreements without consideration. *Woodruff v. Morristown*, 34 N. J. Eq. 174. Necessity and sufficiency of a tender of performance by complainant. *Lawrence v. Miller*, 86 N. Y. 131; *Selleck v. Tallman*, 87 N. Y. 106. Enforcing a parol contract as if it were a covenant running with land. *Lydick v. Baltimore, &c. R. R. Co.*, 17 W. Va. 427.

(a) 1 Fonbl. Eq., Book 1, c. 1, sect. 5; *Story, Eq. Jur.* sect. 717. *Wilkinson v. Clements*, L. R. 8 Ch. 96; 42 L. J. Ch. 38.

(b) *Collier v. Mason*, 25 Beav. 203. (d) *Buxton v. Lister*, 3 Atk. 384.

(c) *Flint v. Brandon*, 8 Ves. 162; (e) *Post*, p. *1127.

ignorant vendor. (*f*) So as regards contracts for the purchase and sale of stock and shares generally, the court will not decree specific performance in favor of a purchaser who can at once go into the market and buy the shares; but if the contract was for the sale of certain specific ascertained or numbered shares, and calls have been made upon those very shares, from payment of which the vendor is entitled to be relieved, or if the remedy by recovery of damages is inadequate, (*g*) the court will interfere in favor of the vendor, and compel the purchaser to accept a transfer and complete the bargain. (*h*) If the contract is conditional, there can be no decree in favor of a person who has not fulfilled the condition imposed upon him. (*i*) The exercise of [* 1122] the jurisdiction of the * court is not a matter of right in the party seeking relief, but of discretion in the court, and the conduct of the party applying for relief is always an important element for consideration. (*k*) Specific performance will not in general be granted unless the court can give full relief to both parties. (*l*) But the circumstance that an agreement, of which specific performance is sought, contains stipulations on the part of the plaintiff which could not themselves be specifically enforced, affords no valid objection to making a decree in favor of the plaintiff, if the intention of the parties was that the performance of those stipulations should be secured by covenant only. (*m*) Where there is a sale of property in fee simple, but there is no such title, the purchaser may have specific performance for as much as he can get (*n*) with compensation for what he cannot get. (*n*) Where the principal agreement cannot be enforced, specific performance of the accessory agreement will not be decreed, (*o*) the general rule being that,

(*f*) *Falcke v. Gray*, 29 L. J. Ch. 28; 117; 35 L. J. Ch. 324; *Ogden v. Fos-sick*, 32 L. J. Ch. 73; *Peto v. Brighton*, 5 Jur. n. s. 645.

(*g*) *Oriental Inland Steam Co. v. Briggs*, 2 Johns. & H. 625. *Uckfield, & Tunbridge Wells Ry. Co.*, 1 H. & M. 168; 32 L. J. Ch. 677.

(*h*) *Cheale v. Kenward*, 3 De Gex & J. 27; 27 L. J. Ch. 784. (*m*) *Wilson v. Hartlepool Harbor Ry. Co.*, 34 L. J. Ch. 241; 2 De G. J. & S. 475.

(*i*) *Weston v. Collins*, 34 L. J. Ch. 353; *Finch v. Underwood*, 2 Ch. D. 310. (*n*) *Barker v. Cox*, 4 Ch. D. 464.

(*k*) *Lamare v. Dixon*, L. R. 6 H. L. 414; *per Lord Chelmsford*, p. 423. (*o*) *Scottish North-Eastern Ry. Co. v. Stewart*, 3 Macq. H. L. Cas. 382.

(*l*) *Blackett v. Bates*, L. R. 1 Ch.

when the court cannot compel the performance of the agreement in its entirety, it will not compel performance of any particular portion of it. (*p*) Possible inconvenience to the public is no ground for refusing specific performance of an agreement. (*q*)

Among the various contracts which have been decreed to be specifically performed are promises by an executor or trustee to leave a legacy to the parties for whom he is trustee, in case they consent to the sale of certain property, where the consent is given, and the trustee dies without making the promised bequest; (*r*) contracts for the sale of debts proved under proceedings in bankruptcy; (*s*) agreements for the sale of the goodwill of a trade and the exclusive use of a secret therein, (*t*) or for the sale of a patent; (*u*) contracts to insure against loss by fire; (*x*) agreements for the grant of an annuity, (*y*) or for the partition or division of joint property, or property held in common; (*z*) covenants and agreements in writing by a landlord to grant a lease, (*a*) or oral *agreements, where the tenant [* 1123] has been let into possession, and has expended money on the faith of the contract, (*b*) provided the terms of the agreement can be distinctly ascertained, and the acts of part performance are referable to that agreement alone; (*c*) contracts to renew a lease, where the intended tenant continues solvent, (*d*) except where there is a breach of a condition precedent by reason of non-repairs, (*e*) and there has been no wilful neglect or refusal, on the part of the tenant, to renew or pay the stipulated or

(*p*) *Merchants' Trading Co. v. Banner*, L. R. 12 Eq. 18; 40 L. J. Ch. 515; *Stocker v. Wedderburn*, 3 K. & J. 393, 407; 26 L. J. Ch. 713; *Ogden v. Fos-sick*, 4 De G. F. & J. 426; 32 L. J. Ch. 73.

(*q*) *Raphael v. Thames Valley Ry. Co.*, L. R. 2 Ch. 147; 36 L. J. Ch. 209; and see *Lloyd v. Lond., Chat., & Dover Ry. Co.*, 2 De G. J. & S. 568; 34 L. J. Ch. 401.

(*r*) *Ridley v. Ridley*, 34 L. J. Ch. 462.

(*s*) *Adderley v. Dixon*, 1 Sim. & St. 610.

(*t*) *Bryson v. Whitehead*, 1 Sim. & St. 74.

(*u*) *Cogent v. Gibson*, 33 Beav. 557.

(*x*) *Story's Eq. Jur. sect. 722.*

(*y*) *Wellesley v. Wellesley*, 4 Myl. & Cr. 579.

(*z*) *Beckley v. Newland*, 2 P. Wms. 182.

(*a*) *Martin v. Pycroft*, 2 De G. M. & G. 798; *Rankin v. Lay*, 29 L. J. Ch. 734; *Parker v. Taswell*, 27 ib. 812; *Middleton v. Greenwood*, 2 De G. J. & S. 142.

(*b*) *Pain v. Coombs*, 3 Sm. & G. 464; *Nunn v. Fabian*, L. R. 1 Ch. 35; 35 L. J. Ch. 140.

(*c*) *Price v. Salusbury*, 32 Beav. 446.

(*d*) *Neale v. Mackenzie*, 1 Keen, 484.

(*e*) *Bastin v. Bidwell*, 18 Ch. D. 238.

customary fine upon renewal; (*f*) contracts for the erection of buildings, where works have been laid out and partially executed, in fulfilment of the contract, which enabled the court to ascertain exactly what was intended to be done; (*g*) contracts by a defendant to make a road or build a bridge on the defendant's land for the use of the plaintiff, (*h*) or on the plaintiff's land; (*i*) and contracts to execute a mortgage with an immediate power of sale. (*k*) But the court does not, in general, enforce specific performance of building contracts, or the performance of work, it being considered that a pecuniary compensation, in the shape of damages, is the appropriate remedy. (*l*) Nor will the courts decree specific performance of a contract for a partnership, (*m*) unless there has been no part performance, (*n*) or of articles of apprenticeship (*o*) or of an agreement to refer. Nor will the court grant specific performance of an agreement for the building of a house of a certain value, or according to a certain plan to be subsequently approved of, or an agreement to make repairs in a house or to write a book. (*p*) Where, however, the agreement is to build a house according to a plan and to take a lease of it, the plaintiff may waive specific performance of that part of the agreement relating to the building of the house, and may have damages for that part and specific performance of the rest of the agreement. (*q*) And specific performance of a contract for the purchase of a lease will not be decreed where, from pending and threatened litigation, it is impossible to ascertain to whom the ground-rent is payable, and the purchaser [* 1124] must be * involved in immediate litigation. (*r*) Nor will specific performance of a charter-party be decreed;

(*f*) *Chesterman v. Mann*, 9 Hare, 213.

(*g*) *Price v. Corp. Penzance*, 4 ib. 509; *Oxford v. Provand*, L. R. 2 P. C. 135.

(*h*) *Storer v. Gt. West. Ry. Co.*, 2 Y. & C. 53; *Wilson v. Furness Ry. Co.*, L. R. 9 Eq. 28; 39 L. J. Ch. 19.

(*i*) *Greene v. West Cheshire Ry. Co.*, L. R. 13 Eq. 44; 41 L. J. Ch. 17.

(*k*) *Hermann v. Hodges*, L. R. 16 Eq. 18.

(*l*) *Moseley v. Virgin*, 3 Ves. 184; *Flint v. Brandon*, 8 ib. 162.

(*m*) *Scott v. Rayment*, L. R. 7 Eq. 112; 38 L. J. Ch. 48.

(*n*) *Story's Eq. Jur. sect. 1457*; *England v. Curling*, 8 Beav. 129.

(*o*) *Webb v. England*, 29 Beav. 44.

(*p*) *Brace v. Wehnert*, 25 Beav. 351; 27 L. J. Ch. 572.

(*q*) *Soames v. Edges*, Johns. 669; *Mayor, &c. of London v. Southgate*, 38 L. J. Ch. 141.

(*r*) *Pegler v. White*, 33 Beav. 403.

but the court will restrain the parties from employing the ship in a manner inconsistent with the rights under the charter-party. (s) It seems doubtful if the court will enforce a contract to sell a medical practice. (ss)

The courts will decree specific performance of all promises of portions, gifts, and settlements made in consideration of marriage; (t) also of covenants by a father, on the marriage of his daughter, to give or bequeathe to such daughter an equal share with his other children of any property he may possess at the time of his death; (u) covenants by a husband to settle after-acquired property upon his wife; deeds or articles of separation; (x) and covenants made by a husband, on his marriage, to make a provision for his wife, which will be enforced, although the wife at the time she seeks the assistance of the court may be living in notorious adultery. (y) But a contract which is framed so as to hold out an inducement to married persons to separate is null and void. (z) "All the authorities prove," observes Lord Cottenham, "that, with respect to marriage contracts, there can be no resistance of performance on the part of one, because another contracting party has failed to perform his part of the agreement; and the obvious reason is, that the parties to the contract are not the only persons having an interest in the subject, but the contract is made by them on behalf of the issue of the marriage. Although, therefore, in the case of an ordinary contract, a party who has not performed his part may not be entitled to claim the benefit of it against the other party, it is different in marriage articles, where the two contracting parties reciprocally enter into contracts for the benefit of a third party." (a)

Specific Performance of Oral Contracts for the sale or lease of lands will also, in certain cases, be decreed, where there has been

(s) *Post*, p. * 1130.

(ss) *May v. Thomson*, 20 Ch. D. 705.

(t) *Ante*, Book 2, c. 6, sect. 3.

(u) *Fortescue v. Hannah*, 9 Ves. 66; *Willis v. Black*, 4 Russ. 170; *Wellesley v. Wellesley*, 4 M. & Cr. 579; *Graftey v. Humpage*, 1 Beav. 54; *Hughes, In re*, 4 Giff. 432, 436.

(x) *Wilson v. Wilson*, 23 L. J. Ch.

700; *Gibbs v. Harding*, L. R. 5 Ch. 336; 39 L. J. Ch. 374; *Sanders v. Rodway*,

16 Jur. 1005.

(y) *Seagrave v. Seagrave*, 13 Ves.

444.

(z) *Ante*, Book 2, c. 6, sect. 3.

(a) *Lloyd v. Lloyd*, 2 M. & Cr. 204.

a part performance by possession having been taken of the subject-matter of the contract, although the contract is required by the statute of frauds to be authenticated by writing; (b) it being considered fraudulent in either party to withdraw from the contract without the consent of the other, where acts have been done in fulfilment of the contract. Where a father promised the proposed husband of his daughter to give him and [* 1125] his intended wife * a house to live in after their marriage, and the marriage was celebrated, and the husband received possession of the house, and treated it as his own, and laid out money upon it in improvements, on the strength of the ante-nuptial promise of the father-in-law, and afterward the father-in-law died, and the heir claimed the house, the Court of Chancery ordered the ante-nuptial promise to be specifically performed, and compelled the heir to execute a conveyance of the property and carry the intention of the promisor into full effect. (c)

The courts will not, it seems, decree specific performance of any contract under seal, in the total absence of a consideration. "The court," observes Lord Cottenham, "will not execute a voluntary contract; and my impression is, that the principle of the court to withhold its assistance applies to a covenant or a settlement." (d)

Specific performance will not, of course, be decreed when the contract has been made between parties not competent to contract, (e) or where it is founded upon an illegal or an immoral consideration, or has been procured by misrepresentation, misstatement, or fraud, (f) or where there has been a clear mistake, (g) or where it is doubtful whether the defendant meant to contract to the extent to which he is sought to be charged. (h) But specific performance of an agreement will not be refused merely on the ground that one of the contracting parties has

(b) *Parker v. Taswell*, 2 De Gex & J. 571; *Nunn v. Fabian*, L. R. 1 Ch. 35.

(c) *Surcome v. Pinniger*, 22 L. J. Ch. 419.

(d) *Jeffreys v. Jeffreys*, 1 Cr. & Ph. 141.

(e) *Story's Eq. Jur.* sects. 751, 787; *Vansittart v. Vansittart*, 4 K. & J. 62.

(f) *New Bruns. & Ry. Co. v. Muggeridge*, 30 L. J. Ch. 242.

(g) *Wood v. Scarth*, 2 K. & J. 33.

(h) *Harnett v. Gelding*, 2 Sch. & Lef. 554.

mistaken its legal effect. Thus where a lessor's agent had contracted to grant a lease for seven or fourteen years, which the lessor understood to mean a lease determinable at the lessor's option, it was held that the lessee was entitled to have the agreement specifically performed, and to have a lease for fourteen years determinable at his own option at the end of seven years. (*i*)

If it is provided that, if either party neglects or refuses to fulfil his part of the engagement, he shall pay a sum of money to the other by way of penalty for non-performance, or as liquidated damages, the courts will, nevertheless, decree a specific performance, if that is the appropriate remedy, just as if no such proviso had been inserted; and the defendant cannot, by forfeiting the penalty, get rid of the agreement. (*k*) Where persons have entered into an agreement to execute a deed containing certain provisions, the court will order the execution of such deed, without regard to the question whether or not its provisions are *such as the court can decree to be specifically performed, the object being to vest in the parties the legal rights which they have mutually agreed to confer on each other. (*l*) The Court of Chancery has in many cases decreed the specific performance of agreements which were so far preliminary that they were to be expanded and embodied in larger terms, and were left with a solicitor for that purpose; but where there are elements of uncertainty about the contract, and it does not appear to have been a complete and concluded bargain, the court will not grant a decree for specific performance. (*m*) Where, therefore, on the making of a contract for sale or purchase, it is agreed that the price to be paid shall be fixed by arbitration, and no arbitrators have been appointed, and no price has been fixed, there can be no decree. (*n*) But the courts disapprove of vendors endeavoring to retain the power

(*i*) *Powell v. Smith*, L. R. 14 Eq. 85; 41 L. J. Ch. 734.

(*k*) *Hopson v. Trevor*, 1 Str. 533; *French v. Macale*, 2 Drur. & War. 269; *Long v. Bowring*, 33 Beav. 585.

(*l*) *Stocker v. Wedderburn*, 3 K. & J. 403; 26 L. J. Ch. 713.

(*m*) *Tillett v. Charing Cross Bridge Co.*, 28 L. J. Ch. 863; *Ridgway v. Wharton*, 6 H. L. C. 288; 27 L. J. Ch. 46; *Taylor v. Portington*, 7 De G. M. & G. 328.

(*n*) *Darbey v. Whitaker*, 4 Drew. 140; *Milnes v. Gery*, 14 Ves. 408.

of escaping from their contracts by introducing provisions for valuing some minor part of the subject-matter of the contract, and refusing to appoint a valuer; and in such cases the courts will decree specific performance as to the main subject-matter of the contract. (o)

The court will not enforce specific performance of an agreement with an auctioneer for the sale by him of books, paintings, and works of art, though a sum of money was paid down by the auctioneer at the time of the execution of the agreement, which money was to be repaid to him out of the proceeds of the sale; (p) but if goods are deposited in the hands of an auctioneer or agent, to be sold by him, in order that he may repay himself his advances upon them, the authority, being coupled with an interest, cannot be revoked; and the auctioneer or agent may sell for the purpose of repaying himself his advances, in spite of the prohibition of the principal; (q) but it is otherwise if the advances have not been made in consideration of the authority to sell. (r) If the agent has only a lien on goods deposited in his hands, he must resort to the courts for an authority to sell. (s)

Granting specific performance is a matter entirely in the discretion of the court. It is not, however, an arbitrary discretion, but is guided and regulated by fixed and settled rules. (t)

In certain cases, where a suit has been instituted for a specific performance of a contract, oral evidence has been permitted to be *given of a subsequent oral agreement acted upon by the parties inconsistent with the equitable enforcement of the original written contract. Such evidence, it is said, does not in anywise contradict or alter the terms of such original contract, but simply shows, from what has subsequently occurred between the parties, that the plaintiff has no equity for a specific performance; (u) for if the defendant can show any circumstance *dehors* the writing, making it inequi-

(o) *Richardson v. Smith*, L. R. 5 Ch. 648; 39 L. J. Ch. 877.

(p) *Chincock v. Sainsbury*, 30 L. J. Ch. 409.

(q) *Ante*, p. * 460.

(r) *Ante*, p. * 460.

(s) *Ante*, p. * 460.

(t) *Haywood v. Cope*, 25 Beav. 151;

27 L. J. Ch. 471.

(u) *Legal v. Miller*, 2 Ves. Sen. 299; *Davis v. Symonds*, 1 Cox, 404.

table to interpose for the purpose of a specific performance, the court, having satisfactory information upon that subject, will not interpose. (x) But a mere oral agreement, subsequently entered into and not acted upon in any way, will not be allowed to control, alter, or discharge the original written contract. There must be "such a part performance of the new parol agreement as would enable the court to grant its aid in the case of an original, independent agreement; and then, in the view of equity, it is tantamount to a written agreement, and effect will be given to it." (y)

Performance Sub Modo. — In some cases a performance of an agreement will be decreed, not according to the letter of the contract, if that would be unconscionable, but according to the change of circumstances. (z)

Specific Performance of Statements and Representations forming the Foundation of a Contract. — "It is a very old head of equity," observes Lord Eldon, "that, if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the person making the representation shall be compelled to make it good, if he knows it to be false." (a) Thus the courts will compel parties making representations concerning the fortunes of persons about to be married, knowing them to be false, to make such representations good. (b) Where, for example, a father represented that his daughter would have a fortune of £10,000 on the death of her parents, and a contract of marriage was entered into on the faith of the representation, the father was compelled to make good the representation he had made. (c)

Orders for the Specific Delivery of Chattels wrongfully detained. — In certain cases, where parties cannot be fully and fairly compensated with pecuniary damages for the loss of some peculiar chattel wrongfully detained by another, the courts

(x) *Clowes v. Higginson*, 1 Ves. & Hill v. Lane, L. R. 11 Eq. 215; 40 L. J. B. 527. Ch. 41.

(y) 1 Sugd. Vend. & Pur. 170, ed. (b) *Hunsden v. Cheyney*, 2 Vern. 1846; *Price v. Dyer*, 17 Ves. 364. 150; *Beverley v. Beverley*, ib. 133;

(z) *Story's Eq. Jur. sect. 775.* *Prole v. Soady*, 29 L. J. Ch. 721.

(a) *Evans v. Bicknell*, 6 Ves. 183; (c) *Bold v. Hutchinson*, 24 L. J. Ch. 290.

[* 1128] will give relief * by ordering the specific chattel detained to be delivered up to the owner. And where a chattel of a particular character, not readily to be purchased in the market, or a chattel having certain associations connected therewith, which may give it some peculiar value in the eyes of the owner, has been delivered and accepted upon some express trust, and the depositary retains it in his hand contrary to that trust, he will be compelled to execute the trust reposed in him. (*d*) Where the defendant had got into his hands a richly-chased silver tobacco-box belonging to the members of a club, who used the box on festive occasions, and entertained a peculiar regard for it, the Lord Chancellor, at the instance of the club, ordered the box to be delivered up to them, an action for damages being considered a very inadequate remedy. (*e*)

Injunction to compel Performance, or to restrain a Breach of Contract. — Where there is a contract to abstain from doing a specific thing, and the damage sustained by its violation cannot be precisely or conveniently estimated in money, the courts will, by injunction, restrain a party from doing the thing that he has promised not to do, and thus enforce performance of the contract, or prevent a breach of it. If a lessee, for example, covenants to spend all his hay or manure on the farm, or if he covenants not to let the demised premises for any part of the term, or if a person covenants not to carry on a certain trade within a certain district, the courts will restrain such party from removing the hay or manure, or letting, or assigning, or carrying on the trade, (*f*) although there is a proviso for the forfeiture of the lease or the payment of a penalty or liquidated damages in case of the non-performance of the covenants. (*g*)

Where a solicitor sold his business, and covenanted with the purchaser that he would not practise as a solicitor in any part of Great Britain, for the space of twenty years, without the purchaser's consent, the court granted an injunction to restrain the solicitor from infringing his covenant. (*h*) And a penalty

(*d*) *Ante*, p. * 1121, 17 & 18 Vict. 125, sect. 78.

(*e*) *Fells v. Read*, 3 Ves. 71.

(*f*) *Greenaway v. Adams*, 12 Ves. 400; *Benwell v. Inns*, 26 L. J. Ch. 663.

(*g*) *Barrett v. Blagrove*, 5 Ves. 555; *Howard v. Woodward*, 34 L. J. Ch. 47.

(*h*) *Whittaker v. Howe*, 3 Beav. 383; *Giles v. Hart*, 5 Jur. n. s. 1381. As to

imposed upon a solicitor's clerk for breach of an agreement not to practise within a certain distance of his employer's place of business will not prevent the court from granting an injunction. (i) Where a messuage was granted to the defendant and his heirs, to the intent and purpose that the trade of a baker should not at any time be carried on therein, the court granted an injunction to restrain the *defendant, his [*1129] heirs and assigns, from carrying on such trade. (k) So where the lease of a house and the goodwill of the trade of a cheesemonger were sold and assigned upon an understanding, by word of mouth, that the vendor would not set up the same trade in the same street, the court, by decree, restrained the vendor from infringing the oral contract. (l) Where mutual covenants were entered into between a lady and the parson, churchwardens, and overseers of a particular parish, whereby it was covenanted that a new cupola, clock, and bell should be erected by the lady for the benefit of the parish, and that the early morning bell, which was rung at five o'clock, should not be again rung in the lifetime of the lady, and the cupola, clock, and bell were erected, and the bell was silent for two years, when it was again rung, the Court of Chancery decreed an injunction against the ringing of the bell. (m)

In the case of transfers of shares, where directors have disregarded the forms of their deed of settlement in the mode of transfer they have established, the courts will interfere, (n) by injunction, to prevent them from annulling their forms and reversing their own rules and regulations to the prejudice of *bona fide* purchasers. (o)

The principle of the jurisdiction is to bind men's consciences to a fair and strict performance of their agreements, not leaving the party with whom the contract has been broken to the chance of what a jury may give in the shape of damages, but enforcing, where it can, the literal performance of the contract. Where

the validity of these contracts, see *ante*, p. *1150.

(i) *Howard v. Woodward*, 34 L. J. Ch. 47.

(k) *Hodson v. Coppard*, 9 W. R. 9; *Johnstone v. Hall*, 2 K. & J. 421.

(l) *Harrison v. Gardner*, 2 Mad. 198.

(m) *Martin v. Nutkin*, *ante*, p. *114.

(n) *Ante*, Book 2, c. 7, sect. 3.

(o) *Bargate v. Shortridge*, 5 H. L. Cas. 297.

there is a contract containing a positive agreement to do something, accompanied by a negative agreement not to do another thing, and complete justice can be done between the parties, the court will restrain the breach of the negative agreement, although it may be unable to enforce performance of the positive agreement. Where a young lady agreed to sing at the Queen's Theatre for a certain number of nights, and that she would not during the period sing anywhere else, but afterward accepted an engagement, and agreed to sing at a rival theatre, the court, by injunction, restrained her from singing at the rival theatre, although it had no power to compel her to sing at the Queen's Theatre. (*p*) And the court will interfere where there is no distinct negative stipulation, and where, therefore, the negative obligation is inferred only from the positive contract. (*q*) But the [* 1130] court will not * interfere by injunction to restrain the breach of a contract for the sale and delivery of chattels which it could not specifically perform; (*r*) and where the principal portion of an agreement is incapable of specific enforcement by the court, and it appears that the entire agreement has been broken, no relief will be granted in respect of a negative clause therein contained which is merely incidental to the general relief sought, although such clause might have been enforced had it stood alone, or had the agreement been in other respects still subsisting and undisputed. (*s*) Where a vessel has been engaged under a charter-party for the performance of a particular voyage, the court will, in certain cases, indirectly enforce performance of the contract by restraining the shipowner from employing his vessel in a manner different from that agreed upon. (*t*) And where a landowner has granted an easement, privilege, or incorporeal right, the court will restrain the vendor and all who buy the land burthened with the easement

(*p*) *Lumley v. Wagner*, 21 L. J. Ch. 898; 1 De G. M. & G. 618; *Webster v. Dillon*, 3 Jur. n. s. 432; *Catt v. Tourle*, L. R. 4 Ch. 654; 38 L. J. Ch. 665.

(*q*) *Montague v. Flockton*, L. R. 16 Eq. 189; 42 L. J. Ch. 677; *Wolverhampton, &c. Ry. Co. v. London & N. W. Ry. Co.*, L. R. 16 Eq. 433, 440.

(*r*) *Fothergill v. Rowland*, L. R. 17 Eq. 132.

(*s*) *Brett v. East India & Lon. Shipping Co.*, 2 H. & M. 404.

(*t*) *De Mattos v. Gibson*, 4 De G. & J. 276; 28 L. J. Ch. 502; *Sevin v. Deslandes*, 30 L. J. Ch. 457; *Le Blanch v. Granger*, 35 Beav. 287.

or servitude from preventing the exercise of the privilege. So where an easement is sold by parol, and has been enjoyed for years, the court will not allow the privilege to be recalled by the vendor or any person claiming under him, unless such person can show that he was a purchaser of the land for value without notice. (*u*)

Enforcement of Performance of Covenants and Agreements not to build, plant, or inclose, &c. — A covenant or agreement between a vendor and purchaser on the sale of land, that the purchaser and his assigns shall use, or abstain from using, the land in a particular way, will be enforced, by injunction, against the immediate parties to the contract, (*x*) and against all subsequent purchasers who purchase the land with notice of the existence of the covenant, whether the covenant be or be not a covenant running with the land, (*y*) unless the party entitled to the benefit of the performance of the contract has acquiesced in the non-observance thereof, and slumbered over his rights. (*z*) But the court never grants the summary remedy by injunction except in those cases where it * would be strictly [* 1131] equitable to grant it. "And it often becomes," observes Sir T. Plumer, "a consideration of great importance with reference to property in the metropolis, how far parties shall be permitted to go back and to revive long antecedent covenants and engagements, and give them an application to the buildings of the metropolis in its present rapidly increasing state." The circumstance that a work undertaken in breach of a valid covenant is one of great public importance, is not sufficient to induce the courts to refuse to restrain the breach of covenant. (*a*)

(*u*) *Hervey v. Smith*, 22 Beav. 302; *Brunswick Building Soc.*, 8 Q. B. D. 403; *Fox v. Pursell*, 3 Sm. & G. 242; see *Allen v. Seckham*, 11 Ch. D. 790.

(*x*) *Rankin v. Huskisson*, 4 Sim. 13. (*z*) *Roper v. Williams*, 1 Turn. & Russ. 18; *Child v. Douglas*, 2 Jur. n. s. 950; 23 Law T. R. 283. As to circumstances not amounting to acquiescence, see *Mitchell v. Steward*, L. R. 1 Eq. 541; *Richards v. Revitt*, 7 Ch. D. 224; *German v. Chapman*, 7 Ch. D. 271.

(*y*) *Tulk v. Moxhay*, 2 Phil. 774; *Mann v. Stephens*, 15 Sim. 377; *Cole v. Sims*, 1 Kay, 56; 5 De G. M. & G. 1; 23 L. J. Ch. 37; *Patching v. Dubbins*, ib. 45; *Clements v. Willes*, L. R. 1 Eq. 200; 35 L. J. Ch. 265; *Keates v. Lyon*, L. R. 4 Ch. 218; 28 L. J. Ch. 357; *Richards v. Revitt*, 7 Ch. D. 224; *Luker v. Dennis*, 7 Ch. D. 227; *Haywood v.*

(*a*) *Lloyd v. Lond., Chat., & Dover Ry. Co.*, 34 L. J. Ch. 401; 2 De G. J. & S. 568.

Covenants restricting the mode of using the land, and perhaps all such as impose such a burthen on the land as can be enforced against the land, will be enforced against an assignee who has notice; but a covenant to repair is not one of these. (b)

If the condition of the property has become entirely changed and altered, and a new set of interests and rights has been created since the covenant was entered into, so that it would be unfair and unjust to enjoin a strict performance of the covenant, the courts will leave the parties to their remedy by recovery of damages, and will decline to interfere by injunction; (c) and "it must not be supposed," observes Lord Brougham, "that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is inconvenient to the public weal that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their personal representatives to answer in damages for breach of their obligations; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote." (d) All covenants, nevertheless, entered into by vendors or purchasers of lands, providing that the land sold or purchased by them shall be used for the purpose of pleasure and the personal accommodation and convenience of the inhabitants of certain houses, and shall not be inclosed or built upon, or injured by the introduction of manufactories, or the carrying on of particular trades, crafts, and professions, or the conveyance of heavy goods across it, may in general be enforced by injunction against all subsequent purchasers who buy and take possession of the property with notice of the covenant. (e)

Where there was a covenant not to use or occupy [* 1132] houses * otherwise than for a private residence, and not for any purpose of trade, it was held that using a

(b) *Haywood v. Brunswick Building Soc.*, 8 Q. B. D. 403.

(c) *Bedford (Duke of) v. Trustees, &c.*, 2 Myl. & K. 573.

(d) *Keppel v. Bailey*, 2 Myl. & K. 538.

(e) *Whatman v. Gibson*, 9 Sim. 206; *Luker v. Dennis*, 7 Ch. D. 227.

house for the education and lodging of one hundred girls in a charitable institution was a breach. (*f*)

If a covenant is entered into with reference to the position of buildings upon a particular plot of ground as part of a scheme for building, it is immaterial whether any damage is consequent on the breach of the covenant; and an assignee of the covenant may obtain an injunction without showing damage; (*g*) and the same holds good of an assignee with notice of such a covenant. (*h*) Where a purchaser of a piece of land with a well on it covenanted with the vendor to supply water to the vendor's houses on the vendor's adjoining land, although the court would not grant specific performance of the required works, yet an injunction was granted to restrain the defendant from allowing the works to remain undone. (*i*) For restrictive covenants as between lessor and lessee, see *post*, p. * 246.

Where the owner of an estate built several houses upon it, and sold some of them, subject to a covenant on the part of the purchaser that he would keep the area, in front of the houses, inclosed with open iron palisades, and would not suffer a single shop window to be put up in them, or carry on any trade, business, or calling whatever in them, or upon the adjoining premises, or suffer the same to be used to the annoyance, nuisance, or injury of any of the houses on the estate, it was held that all subsequent assignees and purchasers of the houses who took them with notice of the covenants were bound by them; and an injunction was granted to prevent one of the houses being used as a girls' school; and it was further held that the covenantee had not waived the benefit of the covenant, although he had permitted other houses, held under a like covenant, to be used as schools; (*k*) for it does not follow that because a plaintiff has permitted one infringement of a covenant he is bound to permit another. (*l*) But where a covenant was entered into by

(*f*) *German v. Chapman*, 7 Ch. D. 271.

(*g*) *Lord Manners v. Johnson*, 1 Ch. D. 673. It was held in this case that a bay window was a "building," and that the making of it was an invasion of privacy, and therefore a "damage."

(*h*) *Richards v. Revett*, 7 Ch. D. 224.

(*i*) *Cooke v. Chilcott*, 3 Ch. D. 694.

(*k*) *Kemp v. Sober*, 1 Sim. n. s. 520; 20 L. J. Ch. 602.

(*l*) *Lloyd v. London, Chatham, & Dover Ry. Co.*, 34 L. J. Ch. 401; 2 De G. J. & S. 568; *Western v. M'Dermot*,

purchasers of land for building, that the buildings should all be erected on a general plan, and the covenantee relaxed the covenant, and allowed important deviations from the plan in favor of some of the covenantors, and others, who had not been licensed to deviate, did deviate, and the covenantor did not interfere with promptitude, but allowed the parties to expend [* 1133] a considerable sum of money, and then applied, by injunction, to prevent them from infringing their covenant, the court refused to interfere, saying that it was a proper case for compensation in damages, and not for an injunction. (m) And the same principle was applied, where the defendant had executed the deed after the breach by the other covenanting parties had been committed, and where the covenant was also a covenant between all the purchasers *inter se*. (n) An injunction is not in general granted where the plaintiff has acquiesced in the performance of the act he seeks to prohibit. If, with a full knowledge of all the circumstances, he has lain by and made no complaint or objection, when he ought in justice to have warned the wrongdoer, the court will refuse its assistance. But acquiescence in a breach of covenant not attended with substantial damage will not bar the right to restrain a subsequent breach so attended. (o)

Injunction and Specific Performance to compel Parties to abide by their own Statements and Representations.— If a man makes a representation on the faith of which another man alters his position, enters into a deed, or incurs an obligation, the man making it is bound to perform that representation, no matter what it is, whether it is for present payment or for the continuance of payment of an annuity, or to make a provision by a will. That in the eye of equity is a contract, an engagement which the man making it is bound to perform. (p) But in all such cases

L. R. 2 Ch. 72; 35 L. J. Ch. 190; 36 L. R. 3 Eq. 515. (n) *Peek v. Matthews*, L. R. 3 Eq. 515.

ib. 76; *Richards v. Revett*, and *German v. Chapman*, *supra*.

(m) *Roper v. Williams*, Turn. & Russ. 22. But see *German v. Chapman*, *supra*. (o) *Western v. M'Dermot*, L. R. 2 Ch. 72; 35 L. J. Ch. 190; 36 ib. 76.

(p) *Per Bacon, V. C.*, in *Dashwood v. Jermyn*, 12 Ch. D. 781.

As to parties entitled to the benefit of these covenants, see *Schreiber v. Creed*, 10 Sim. 9.

the man making the representation must be brought face to face with the promisee. (*q*) Where the defendant, being possessed of certain leasehold estates, sublet a part of the demised premises to the plaintiff, on the strength of a representation that he, the defendant, was prevented by the covenants of the lease from building so as to obstruct the sea view, and thereby received an increased price for his land, and stood by whilst the sub-lessee erected houses on the property sublet, which were valuable by reason of the sea view, and would be almost worthless without it, the court interfered by injunction to prevent the defendant from building so as to obstruct the sea view from the houses so erected. (*r*)

Foreign Contracts. — A foreign contract, as a general rule, will not be enforced, unless it is valid both by the law of the country in which it was made, and by the law of the country in which it is * sought to be enforced. (*s*) A debt or [* 1134] liability arising in a foreign country may, of course, be discharged by the laws of that country, and such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim in the courts of this country. (*t*)

(*q*) *Ib.*

(*r*) *Piggott v. Stratton*, 29 L. J. Ch. 1.

(*s*) 2 *Spence's Eq. Jur.* 13, 14; *Hope v. Hope*, 8 De G. M. & G. 731.

(*t*) *Burrows v. Jemino*, 2 Stra. 733; *Ballantine v. Golding*, Cook's Bk. Law,

419; *Potter v. Brown*, 5 East, 124; *Od-*

win v. Forbes, Buck, 57; *Quelin v.*

Moisson, 1 Knapp, 265; *Gardiner v.*

Houghton, 2 B. & S. 743; *Phillips*

v. Eyre, L. R. 6 Q. B. 1, 28.

[* 1135]

* CHAPTER II.

OF THE AVOIDANCE OF CONTRACTS.

SECTION I.

VOID CONTRACTS.¹⁰⁷

Distinction between Void and Voidable Contracts.¹—A contract which is void has no legal effect, and binds neither party;

¹ "Void" means that an instrument or transaction is so nugatory and ineffectual, that nothing can cure it; "voidable" applies when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it: thus, while acceptance of rent will make good a voidable lease, it will not affirm a void lease. The Court of Chancery has drawn this distinction between voidable and void contracts: The former will be decreed to be delivered up, since their retention is liable to be applied to improper purposes, such as future litigation, when lapse of time may have weakened or destroyed the means of defence, or their existence uncanceled may cloud a title, or diminish its value and security; but as to void instruments, the illegality of which appears upon their face, equity does not interpose its authority, since their production at any time will plainly establish their nullity. Wharton, L. Dict.

"Void," in its least limited sense, implies an act of no effect at all, a nullity *ab initio*. When used in a statute in reference to the solemn acts and judgments of superior courts, it may mean no more than voidable. *Inskeep v. Lecony*, 1 N. J. L. 111.

"Void," as used in statutes and by the courts, does not usually mean that the act or proceeding is an absolute nullity. *Kearney v. Vaughan*, 50 Mo. 284.

"Void" does not always imply entire nullity, but is, in a legal sense, subject to large qualifications, in view of all the circumstances in a given case. *Brown v. Brown*, 50 N. H. 538, 552.

"Void" properly means of no legal force, — null, and incapable of confirmation or ratification, — but is frequently used in the sense of voidable; thus a statute provision that, "if an owner of lands sold for taxes establishes fraud in the sale, the sale shall be void," may be construed to mean may be avoided. *Van Shaack v. Robbins*, 36 Iowa, 201.

Probably no words are more inaccurately used in the books than "void" and "voidable." Statutes frequently declare acts void which the tenor of their provisions makes voidable only. Perhaps the best excuse made for such inaccuracy is that of Parker, C. J.: "Whatever may be avoided may be called void; and this use of

a contract which one of the parties may set aside under certain conditions, is voidable only, but, unless set aside, is binding on both parties.

Of Immoral Contracts.²—Whenever a contract has been entered into for the performance of an immoral act, or an act which

the term void is not uncommon in the language of statutes and of courts. But in regard to the consequences to third persons, the distinction is highly important, because nothing can be founded upon what is absolutely void, whereas from those which are only voidable, fair titles may flow. The terms have not always been used with nice discrimination,—indeed, in some books there is a great want of precision in the use of them." *Crocker v. Bellangee*, 6 Wis. 645; *Bromley v. Goodrich*, 40 Wis. 131. See also, *Allis v. Billings*, 6 Met. (Mass.) 415; *Hone v. Woolsey*, 2 Edw. Ch. 289; *Anderson v. Roberts*, 18 Johns. 515; *Pearson v. Chapin*, 44 Pa. St. 9.

The true distinction between void and voidable acts, orders, and judgments is, that the former can always be assailed in any proceeding, and the latter only in a direct proceeding. *Alexander v. Nelson*, 42 Ala. 462.

The distinction between the terms void and voidable, in their application to contracts, is often one of great practical importance; and whenever entire technical accuracy is required, the term void can only be properly applied to those contracts that are of no effect whatsoever, such as are a mere nullity, and incapable of confirmation or ratification. *Allis v. Billings*, 6 Metc. (Mass.) 415.

A contract void in itself cannot be confirmed. One voidable may be confirmed by the party who may avoid it; but to render such confirmation valid, it must be done with knowledge. *Carnes v. Polk*, 4 Coldw. 87.

² The general rule is established, that a contract which is contrary to morality, positive law, or public policy will not be enforced by the courts. *Scudder v. Andrews*, 2 McLean, 464; *Milne v. Huber*, 3 McLean, 212; *Wooten v. Miller*, 15 Miss. 380; *Adams v. Rowan*, 16 Miss. 624; *Davis v. Holbrook*, 1 La. Ann. 178; *Mouton v. Noble*, ib. 192; *Leavitt v. Palmer*, 3 N. Y. 19. After it has been executed, they will not interfere with what has been done, but so long as it is executory, they will lend no aid to either party to enforce it. *Baily v. Milner*, 35 Ga. 330; *Adams v. Barrett*, 5 Ga. 404; *Judah v. Trustees, &c.*, 16 Ind. 56; *Smead v. Williamson*, 16 B. Mon. 492; *State v. Reiss*, 12 La. Ann. 166; *Greene v. Godfrey*, 44 Me. 25; *Andrews v. Marshall*, 48 Me. 26; *Bagg v. Jerome*, 7 Mich. 145; *Hoover v. Pierce*, 26 Miss. 627; *Howell v. Fountain*, 3 Ga. 176; s. r. *Denton v. Erwin*, 6 La. Ann. 317; *Hertz v. Wilder*, 10 La. Ann. 199; *Summerlin v. Livingston*, 15 La. Ann. 519; *White v. Hunter*, 23 N. H. 128; *Denton v. English*, 2 Nott & M. 581; *Worcester v. Eaton*, 11 Mass. 368. But mere moral turpitude is not enough to avoid a contract; there must be fraud or illegality growing out of the violation of some rule of law or some statute. *Moore v. Remington*, 34 Barb. 427. And a contract innocent in itself will not be avoided merely because connected with an illegal transaction, unless the former directly facilitates the latter. *De Groot v. Van Duzer*, 17 Wend. 170.

The test whether a demand connected with an illegal transaction can be enforced at law, is that the plaintiff requires the aid of the illegal transaction to establish his case. *Scott v. Duffy*, 14 Pa. St. 18.

With respect to the effect of novation, the general rule is that illegality in a contract vitiates all substituted contracts, and also all contracts contrived and intended to carry that contract into effect. *Shelton v. Marshall*, 16 Tex. 344; *Bontelle v. Mel-*

is contrary to the provisions of an act of parliament, or to the public policy of the common law, the courts will not lend their assistance for the enforcement of the contract; (a) and a deed will be set aside where the consideration is immoral. (b) If the illegality of the contract appears upon the face of it, it is at once fatal to an action thereon; and if it does not so appear, the fact of its existence may be established through the medium of parol or oral testimony; but "illegality is never presumed; on the contrary, everything must be presumed to have been legally done, till the contrary be proved." (c) Bonds, agreements, and guarantees to indemnify persons against the consequences of their illegal acts are absolutely null and void, whether the parties giving the bond or indemnity did or did not know of the

endy, 19 N. H. 196; *McGreal v. Wilson*, 9 Tex. 426; *Coulter v. Robinson*, 22 Miss. 18. Not only when the contract drawn in question grows immediately out of, and is connected with, an illegal or immoral act, but also when it is connected in part only with the illegal transaction, and grows immediately out of it, though in fact a new contract, it is equally tainted. *Toler v. Armstrong*, 4 Wash. 297; 11 Wheat. 258; s. p. *Dumont v. Dufore*, 27 Ind. 263; *Merrick v. Trustees, &c.*, 8 Gill, 59; *Forsythe v. State*, 6 Ohio, 21; *Brus's Appeal*, 55 Pa. St. 294. Yet where the contract is disjoined from the original unlawful act, and is founded on a new and distinct consideration, although for money advanced in satisfaction of an unlawful transaction, an action may be maintained upon it. *Hook v. Gray*, 6 Barb. 398. And where, after an illegal act is done, a new contract, wholly unconnected with the illegal act, is formed, founded upon a new consideration, and no part of the original scheme, such new contract in itself is not unlawful. *Thornburg v. Harris*, 3 Coldw. 157. So where an illegal transaction has taken place, an agent who has received money on the part of his principal will not be allowed to shelter himself from the payment of it to his principal on the ground of the illegality of the original transaction. *Anderson v. Moncrief*, 3 Desau. 132. See also *Vischer v. Yates*, 11 Johns. 23; *McAllister v. Hoffman*, 16 Serg. & R. 147.

See, further, 1 Story, *Contr.* (5th ed.) c. 18, 19; 2 Pars. *Contr.* c. 3, sect. 11, p. 746; 7 Wait, *Act. & D.* c. 31; U. S. Dig. tit. *Contracts*, sects. 1328-1558; ib. sects. 1193-1246; Ann. Dig. 1870-78, tit. *Contracts*, III.; Ann. Dig. 1879, &c., tit. *Contracts*, I. d; note on Rights of parties to illegal, &c. transactions, 34 Am. Dec. 765; *Todd v. Rafferty*, 18 Am. L. Reg. n. s. 476, and note by H. Budd, Jr. ib. 483; article on Pooling contracts, 16 West. Jur. 329.

As to invalidity of agreement to indemnify a person against consequences of his having done, or doing in future, an illegal act, see *Stone v. Hooker*, 9 Cow. 154; *Davis v. Arledge*, 3 Hill (S. C.) 170; *Ives v. Jones*, 3 Ired. L. 538, 40 Am. Dec. 421, and note, ib. 425.

(a) *Holman v. Johnson*, 1 Cowp. 343; (c) *Bennett v. Clough*, 1 B. & Ald. 463; *Fivaz v. Nicholls*, 2 C. B. 501; 15 L. J. 463; *Broom's Maxims*, 427; French C. P. 125; Cod. lib. 2, tit. 3, lex 6. Cod. Civ. liv. 3, sects. 1, 1116.

(b) *Willyams v. Bullmore*, 32 Beav. 574; 33 L. J. Ch. 461.

illegality of the transaction. (*d*) Such are contracts to indemnify a man against the consequences of publishing a libel, (*e*) or to indemnify a sheriff or other ministerial officer of the law against the pecuniary consequences resulting to himself from his permitting a prisoner to go * at large, or committing [* 1136] any other breach of duty; (*f*) or a promise to pay a man a sum of money "in consideration that he will beat another out of such a close;" (*g*) or to save him harmless in consideration that he will confine and imprison another; (*h*) but an agreement to surrender a third party into the custody of the sheriff is not necessarily illegal. (*i*) Where the defendant agreed that he would not expose the adultery of the plaintiff, if the plaintiff would not sue on a bond, it was held that the agreement was void. (*k*) Where the defendant contracted to let rooms to the plaintiff, but afterward, on discovering that they were intended to be used for the delivery of lectures of a blasphemous character, refused to allow the use of them, it was held that the purpose was illegal, and that the contract could not be enforced by law. (*l*)

Contracts tending to promote Fornication and Prostitution¹ are null and void, as being *contra bonos mores*, such as bonds, covenants, promissory notes, or securities for the payment of money, given to a woman in order to induce her to commit fornication, or to live in a state of concubinage or prostitution, (*m*) or to secure a maintenance to a married woman in order that she may be induced to leave her husband and carry on an illicit intercourse with another man; (*n*) but if a man covenants to pay an annuity to a woman in consideration of past cohabitation, or gives her a bond to secure to her the payment of money for her

¹ See U. S. Dig. tit. *Contracts*, sect. 1441; Ann. Dig. 1870-78, tit. *Contracts*, III.; *Drennan v. Douglas*, 102 Ill. 341.

(*d*) *Duvergier v. Fellows*, 10 B. & C. 826.

(*e*) *Shackell v. Rosier*, 2 Bing. N. C. 634; 3 Sc. 59.

(*f*) *Featherston v. Hutchinson*, Cro. Eliz. 199; *Morris v. Chapman, Jones*, 24.

(*g*) *Allen v. Rescous*, 2 Lev. 174.

(*h*) *Fletcher v. Harcot, Hut.* 55.

(*i*) *Lewis v. Davison*, 4 M. & W. 657.

(*k*) *Brown v. Brine*, 1 Ex. D. 5.

(*l*) *Cowan v. Milbourn*, L. R. 2 Ex. 290; 36 L. J. Ex. 124.

(*m*) *Robinson v. Cox*, 9 Mod. 263; *Walker v. Perkins*, 3 Burr. 1568; *Friend v. Harrison*, 2 C. & P. 584.

(*n*) *Evans v. Carrington*, 30 L. J. Ch. 370.

support or the support of her children, the contract is valid, and an action may be maintained upon it. (o) The contract, however, must be made by deed, past cohabitation and seduction being, as we have already seen, an insufficient consideration for the support of a simple contract or promise. (p) A contract by the mother of a bastard child to release the putative father, in consideration of a present money payment, from all further payments in respect of the child, is not void in law; but neither is it a bar to the jurisdiction of the magistrate to make an order of affiliation on the father, such order being, under the statute, for the benefit of the child, and not of the mother exclusively. (q) If a landlord * knowingly permits a female lodger to carry on the trade of prostitution under his roof, the courts will give him no assistance for the recovery of his rent. (r) One who makes a contract for sale or hire, with the knowledge that the other contracting party intends to apply the subject-matter of the contract to an immoral or illegal use, cannot recover upon the contract; and it is not necessary that he should expect to be paid out of the proceeds of the immoral or illegal act. (s) Thus, where coachbuilders, knowing a woman to be a prostitute, supplied her with a brougham with a knowledge that it would be, as in fact it was, used by her as part of her display to attract men, it was held that they could not recover the price, although there was no evidence that they looked expressly to the proceeds of her prostitution for payment. (t) But "a prostitute must have a lodging as well as other people;" and if she merely uses the lodgings to live in and plies her trade elsewhere, there is no answer to the landlord's claim for his rent. (u) Where an action was brought for the charges of wash-

(o) *Gibson v. Dickie*, 3 M. & S. 463; *Turner v. Vaughan*, 2 Wils. 389; *Nye v. Moseley*, 6 B. & C. 133; 9 D. & R. 165; *Annandale v. Harris*, 2 P. Wms. 432; *Priest v. Parrot*, 2 Ves. Sen. 160; *Knye v. Moore*, 1 S. & S. 61; 2 ib. 260.

(p) *Beaumont v. Reeve*, 8 Q. B. 483; 15 L. J. Q. B. 141; *Matthews v. L—e*, 1 Mad. 558. (r) *Jennings v. Throgmorton*, R. & M. 251; *Girardy v. Richardson*, 1 Esp. 12; and see *Smith v. White*, L. R. 1 Eq. 626; 35 L. J. Ch. 454.

(s) *Cannan v. Bryce*, 3 B. & A. 179; *McKinnell v. Robinson*, 3 M. & W. 434. (t) *Pearce v. Brookes*, L. R. 1 Ex. 213; 35 L. J. Ex. 134; 4 H. & C. 358. (u) *Crisp v. Churchill*, cited 1 B. & P. 340.

(q) *Follit v. Koetzow*, 2 Ell. & Ell. 730; 29 L. J. M. C. 128.

ing a variety of expensive dresses and numerous gentlemen's nightcaps, and it appeared that the dresses were used by the defendant for the purpose of enabling her to decoy gentlemen to her bed, and the nightcaps for those gentlemen to sleep in when she got them there, and the plaintiff was aware of the uses to which the dresses and nightcaps were applied, it was held that the plaintiff was nevertheless entitled to recover for the washing. "This unfortunate woman" (the defendant), observes Buller, J., "must have clean linen; and it is impossible for the court to take into consideration which of these articles were used for an improper purpose, and which were not." (x) A shopkeeper cannot recover the price of immoral or obscene prints and libels sold by him; (y) and a printer cannot bring an action against a publisher for the price agreed to be paid for printing an indecent, libellous, and immoral history, setting forth the amours and intrigues of a prostitute. Every servant and workman, "to the lowest," knowingly engaged in putting forth such a work to the public, is prevented from suing for compensation. (z)

Contracts against Public Policy.¹—A covenant by a father that he will abstain from seeing or exercising any control over his children, is void as being contrary to the policy of the law, (a) * unless the father has, by gross misconduct, manifested himself unfit to associate with them. (b) [* 1138]

¹ U. S. Dig. tit. *Contracts*, IV., particularly sects. 1351, 1451, 1507, 1509; Ann. Dig. 1870-1878, tit. *Contracts*, III.; Ann. Dig. 1879, &c., tit. *Contracts*, I. d; Clippinger v. Hepbaugh, 5 Watts & S. 315, 40 Am. Dec. 519, and note, ib. 524; Meguire v. Corwine, 101 U. S. 108; Clark v. United States, 102 U. S. 322; Oscanyan v. Arms Co., 103 U. S. 261; Williamson v. C. R. I. & P. Ry. Co., 53 Iowa, 126; Western Union Tel. Co. v. American Union Tel. Co., 65 Ga. 160; Olin v. Bate, 98 Ill. 53; article on Pooling contracts, 16 West. Jur. 329.

(x) Lloyd v. Johnson, 1 B. & P. 340.

(y) Fores v. Johnes, 4 Esp. 97.

(z) Poplett v. Stockdale, 2 C. & P. 200.

(a) Vansittart v. Vansittart, 4 K. & J. 62; 2 De G. & J. 249; 27 L. J. Ch. 289; Hamilton v. Hector, L. R. 6 Ch. 701; 40 L. J. Ch. 692.

(b) Swift v. Swift, 34 L. J. Ch. 209, 394; 34 Beav. 266. By the 36 Vict. c. 12, sect. 2, "no agreement contained in any separate deed made between the

father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: Provided always that no court shall enforce any such agreement if the court shall be of opinion that it will not be for the benefit of the infant to give effect thereto." See, further, as to the right of fathers to the custody of their children, Add. on Torts (5th ed., by Cave), p. 543.

But a bond given by the father of illegitimate children to the mother to secure her an annuity on condition of her giving up the care and custody of the children, is legal, and may be enforced. (c) A promise by a client to his solicitor to make him a present beyond the scale of ordinary legal remuneration is void as being contrary to the public policy of the law ; (d) and so are all contracts between solicitors and clients for the purchase of property from the client ; (e) and all contracts prejudicial to the interests of the public, — such as a contract tending to prevent free competition, (f) to influence improperly the performance of public duties, or having for its object the purchase or acquisition by money of a dignity or title of honor in the gift of the crown. (g) A contract with a candidate for a seat in parliament, to supply meat and drink to the electors of a borough, is illegal and void, as tending to bribery and corruption, and being contrary to the public policy of the law ; and so is every description of contract, with whomsoever made, which has for its object the inducing of the voters at an election to vote in favor of any particular individual. (h) If money is lent to an elector as an inducement to him to give his vote, it cannot be recovered back ; nor can any security given for its repayment be enforced. A contract with a member of the legislature to induce him to vote in a particular way, placing his private interest in opposition to his public duty, is void ; but a member of the legislature may make terms for the sale of his lands, and for compensation for injury he may sustain from the carrying out of an undertaking seeking

(c) *In re Plaskett's Estate*, 30 L. J. Ch. 606.

(d) *O'Brien v. Lewis*, 4 Giff. 221 ; 32 L. J. Ch. 569 ; *Tyrrel v. Bp. of London*, 10 H. L. C. 26 ; 31 L. J. Ch. 396 ; *Pince v. Beattie*, 32 ib. 734. But see now the 33 & 34 Vict. c. 28, by which agreements in writing between solicitors and their clients, as to the remuneration of the former, are legalized, subject to examination and allowance by a taxing-master. By sect. 11, an agreement for payment only in the event of success is void ; but it has been held that an agreement to charge nothing if the action was lost and to take nothing for costs out of

any money recovered in such action was not void, and did not need to be in writing. *Jennings v. Johnson*, L. R. 8 C. P. 425. Such an agreement must be signed by both parties. *Re Lewis*, 1 Q. B. D. 724. The above statute is not applicable to conveyancing and other non-contentious matters. See 44 & 45 Vict. c. 44, sects. 8, 9.

(e) *Post*, p. * 1179.

(f) *Hilton v. Eckersley*, 6 Ell. & Bl. 64.

(g) *Egerton v. Earl Brownlow*, 4 H. L. C. 235 ; 18 Jur. 71.

(h) *Thomas v. Edwards*, 2 M. & W. 218.

parliamentary sanction. (i) A contract to abandon rights under the Employer's Liability Act, 1880, is not void. (ii)

* **Contracts providing for the Future Separation of** [* 1139]
Husband and Wife are contrary to public policy, and therefore void. (k) But a contract between the husband and a trustee on behalf of the wife, providing for the terms of a present separation, will be enforced. (l)

Contracts in Restraint of Marriage are void, as being opposed to public policy; (m) but a restriction against marriage with one specified person is not illegal. (n)

Maintenance.¹—Agreements to furnish money to be risked on the event of a lawsuit, or to aid and assist in the prosecution of lawsuits, in which the party making the agreement is in nowise interested, and with which he has no just or reasonable ground for interference, are void, as tending to keep alive strife and contention. (o) But if the party has any interest in the thing in dispute, or has a fair and reasonable ground for thinking that he has rights in common with other parties, he may lawfully enter into an agreement with them for the prosecution or defence of those rights. (p) It is laid down in our old law books that, for avoiding maintenance, rights of action cannot be assigned or granted over by one man to another. Thus "if a man owe me money on an obligation or the like, I cannot grant this debt to another; but I may grant a letter of attorney to another man to sue for it and receive it, or I may grant the writing itself to another, and he may cancel it or give it to the obligor." (q) But

¹ Consult authorities cited in American note next following this.

(i) *Lord Howden v. Simpson*, 1 Rail. Cas. 347. 71, 81; *Earle v. Hopwood*, 30 L. J. C. P. 217; 9 C. B. n. s. 566.

(ii) *Griffiths v. Earl Dudley*, 9 Q. B. D. 357. (p) 4 Bl. Com. 134, 135; 2 Roll. Abr. 115; *Findon v. Parker*, 11 M. & W. 682. Such relationship as that of a cousin is not sufficient to make such an agreement lawful. *Hutley v. Hutley*, L. R. 8 Q. B. 112. But a father may assist his son, a husband his wife, or a master his servant, without being guilty of maintenance.

(k) *Merryweather v. Jones*, 4 Giff. 509.

(l) *Gibbs v. Harding*, L. R. 5 Ch. 336; 39 L. J. Ch. 374.

(m) *Ante*, p. * 834.

(n) *Topham v. Duke of Portland*, 32 L. J. Ch. 81. (q) *Vin. Abr. Assignment (B) (D)*; 2 Inst. 564; *Pierson v. Hughes*, *Freem. Bro. Abr. Chose in action*; Co. Litt. 265 a.

the ancient rule had been so explained away at common law, that it remained only as an objection to the form of the action; and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, protected the assignment of a chose in action as much as the law would that of a chose in possession. (*r*) Rights of action, debts, and claims to money due on contracts, may therefore now be purchased without making the purchaser guilty of maintenance. If, however, the purchaser gives an indemnity against all the costs that have been, or may be, incurred by the vendor in the prosecution of the suit, the contract will then amount to maintenance, and will consequently be void. (*s*)

[* 1140] * **Champerty.**¹ — When the party officiously and unwarrantably agreeing to furnish money, or to aid in the maintenance of the action or suit, is to share in the advantages thereof, he is said to be guilty of *champerty* (*campi partitio*), and the agreement is void. (*t*) But if the interference does not amount to maintenance, there is no champerty, although the party tendering the assistance is to receive the money recovered in the action. (*u*) An agreement by a solicitor not to charge his client's costs in consideration of his being allowed to retain for his own use a share of the sums recovered by him for them, amounts to champerty, and is illegal and void; (*x*) but if the work is done, and the client receives the benefit of it, the solicitor will be entitled to his costs as between solicitor and client. (*y*) An agreement (to be carried into effect in this country) which, if made in this country, would be void on the ground of champerty,

¹ U. S. Dig. tit. *Contracts*, sects. 1527, 1551; see also ib. tit. *Champerty*; *State v. Sims*, 76 Ind. 328; *Ackert v. Barker*, 131 Mass. 436; *Million v. Olm-org*, 10 Mo. App. 432; *Courtright v. Burnes*, 13 Fed. Reporter, 317, and note.

(*r*) Co. Litt. 232 b, n. 1; *Tyson v. Jackson*, 30 Beav. 384; *Hare v. London & N. W. Ry. Co.*, Johns. 722.

(*s*) *Harrington v. Long*, 2 Myl. & K. 590; *Jones v. Thomas*, 2 Y. & C. 498.

(*t*) *Stanly v. Jones*, 5 M. & P. 207; 7 Bing. 369; *Reynell v. Sprye*, 21 L. J. Ch. 633; 8 Hare, 222; 1 De G. M. & G. 660; *Sprye v. Porter*, 7 Ell. & Bl. 80; 26 L. J. Q. B. 64.

(*u*) *Williams v. Protheroe*, 3 Y. & J. 129; 2 M. & P. 779.

(*x*) *In re Masters*, 4 Dowl. P. C. 21; *Ex parte Yeatman*, ib. 304; *Hilton v. Woods*, L. R. 4 Eq. 432; 36 L. J. Ch. 941; *Pince v. Beattie*, 32 L. J. Ch. 734; *Earle v. Hopwood*, 9 C. B. n. s. 566; 30 L. J. C. P. 217; 32 Hen. VIII. c. 9; see *Coondoo v. Mookerjee*, 2 Ap. Ca. 186.

(*y*) *Grell v. Levy*, 16 C. B. n. s. 73.

is not the less void because made in a foreign country where such a contract would be legal. (z) The purchase of an estate for the purpose of setting aside a previous agreement affecting the property on the ground of fraud, partakes of the nature of champerty, and will not be enforced. (a)

The statutes against champerty were directed mainly against speculations in lawsuits, and were intended to repress the gambling propensity which formerly prevailed of buying up doubtful titles. It was never intended to prevent persons from charging the subject-matter of the suit in order to obtain the means of prosecuting it. (b)

Agreements between solicitors and their clients respecting payment for services are now regulated by the 33 & 34 Vict. c. 28. No action is to be brought upon such agreements, but they may be enforced by motion (c) and rule or order, or set aside. (d) Nothing in the act is to render valid an agreement for payment only in the event of success, (e) or one which is void under the bankruptcy laws. (f)

Contracts Obstructing or Interfering with the Administration of Public Justice ² are also null and void, as being contrary to the * public policy of the law. All contracts [* 1141] prohibiting parties from bringing an action, and all agreements purporting to oust the courts of their jurisdiction altogether, are void. (g) But an agreement to refer existing or future differences to arbitration may be enforced, (h) whether the difference is one of fact or of law; (i) and agreements for

² *Hinesburgh v. Sumner*, 9 Vt. 23, 31 Am. Dec. 599, and note on Contracts whose consideration is agreement to compound criminal prosecution, ib. 600; *Bierbauer v. Wirth*, 5 Fed. Reporter, 336; *Barron v. Tucker*, 53 Vt. 338.

(z) *Grell v. Levy*, 16 C. B. n. s. 73.

(a) *De Hoyhton v. Money*, L. R. 2 Ch. 164; *Hill v. Boyle*, L. R. 4 Eq. 260.

(b) *Anderson v. Radcliffe*, Ell. Bl. & Ell. 817; 29 L. J. Q. B. 12; *Scott v. Miller*, 28 L. J. Ch. 584.

(c) Sect. 8.

(d) Sect. 9.

(e) Sect. 11; see *In re Attorney & Solicitor's Act*, 1870; 1 Ch. D. 573.

(f) Sect. 12.

(g) *Horton v. Sayer*, 4 H. & N. 643;

29 L. J. Ex. 28; *Lee v. Page*, 30 L. J. Ch. 857; *Edwards v. Aberayron Ins. Soc.*, 1 Q. B. D. 563; *Hope v. International Soc.*, 4 Ch. D. 327, 334.

(h) 17 & 18 Vict. c. 125, sect. 11; *Roper v. Lendon*, 1 Ell. & Ell. 825; 28 L. J. Q. B. 262.

(i) *Randegger v. Holmes*, L. R. 1 C. P. 679.

determining only the amount to be recovered by arbitration are valid ; (*k*) and the determination by arbitration of the amount of damages to be recovered, or the time of payment, may lawfully be made a condition precedent to the right to maintain an action. (*l*) It is difficult to reconcile and give effect to two propositions so nearly in direct opposition as that no contract of the parties shall oust the jurisdiction of the courts, and that, on any difference arising between two parties, it shall be referred to arbitration ; but the fair result of the authorities is that, if the contract is in such terms that a reference to a third person is a condition precedent to the right of the party to maintain an action, then he is not entitled to maintain it until that condition has been complied with ; but if, on the other hand, the contract is to pay for the loss (or other matter in question) with a subsequent contract to refer the question to arbitration, contained in a distinct clause collateral to the other, then that contract for reference will not oust the jurisdiction of the courts, or deprive the party of this action. (*m*) All agreements to pay money to induce a party to stifle or suppress evidence, or to give evidence in favor of one side only, or not to appear as a witness in a civil suit or a criminal prosecution, are null and void, (*n*) and will be set aside ; (*o*) and so are all agreements to compound a felony, or to forego a prosecution for a public misdemeanor, (*p*) or to hush up a charge of embezzlement, (*q*) or to compromise a suit for divorce in consideration of money to be paid to the petitioner by the co-respondent, (*r*) or to pay money in consideration that a party will use his private interest and influence with the crown to obtain the pardon of a criminal, (*s*) or to pay

(*k*) *Horton v. Sayer, supra* ; *Lee v. Page*, 30 L. J. Ch. 857.

(*l*) *Scott v. Avery*, 5 H. L. Cas. 811 ; 25 L. J. Ex. 308 ; *Brown v. Overbury*, 11 Exch. 715 ; *Scott v. Corp. of Liverpool*, 28 L. J. Ch. 230 ; *Tredwen v. Holman*, 1 H. & C. 72 ; 31 L. J. Ex. 398 ; *Braunstein v. Accidental Death Insurance Co.*, 1 B. & S. 782 ; 31 L. J. Q. B. 17 ; *Edwards v. Aberayron Ins. Soc.*, *supra* ; *Dawson v. Fitzgerald*, 1 Ex. D. 257 ; *Babbage v. Coulburn*, 9 Q. B. D. 235.

(*m*) *Elliott v. Royal Exchange Assurance Co.*, L. R. 2 Ex. 237, 242.

(*n*) *Collins v. Blantern*, 2 Wils. 347.

(*o*) *Williams v. Bayley*, L. R. 1 H. L. 200 ; 35 L. J. Ch. 717.

(*p*) *Keir v. Leeman*, 6 Q. B. 308 ; *Edgcombe v. Rodd*, 5 East, 294.

(*q*) *Ex parte Critchley*, 15 L. J. Q. B. 124 ; *Williams v. Bayley*, L. R. 1 H. L. 200 ; 35 L. J. Ch. 717.

(*r*) *Gippe v. Hume*, 31 L. J. Ch. 37.

(*s*) *Norman v. Cole*, 3 Esp. 253.

money in consideration of *the abandonment of a [*1142] petition presented to the House of Commons against the return of a member on the ground of bribery; (t) and all agreements interfering with the execution and proper administration of the bankrupt laws, and the examination and discharge of bankrupts, or tending to deceive the trustees or officers of the court, or to induce them not to do their duty. (u) And not only is the agreement itself void, but any bill of exchange, promissory note, or other security given in pursuance of any such agreement, is tainted with illegality and cannot be enforced, unless it is a negotiable security in the hands of a *bona fide* holder for value, without notice of the illegality. (x) But an agreement to compound civil rights, or to forego or settle an action that has been commenced, (y) or to compromise one of those misdemeanors where the person injured has the choice between a civil and a criminal remedy (z) or to discharge a party from imprisonment under civil process, or his goods from a distress or execution, (a) is valid, and may be enforced. All contracts, bonds, indemnities, guarantees, and undertakings tending to induce sheriffs, gaolers, town-clerks, and public officers to violate or neglect their duty, or made to protect them from the consequences of their misconduct, are absolutely null and void. (b) But an engagement or undertaking to indemnify a sheriff in the execution of a lawful act, or in the exercise of the duties of his office, is valid, and may be enforced, — such as an indemnity bond to induce him to execute or not to execute a *fi. fa.* upon goods and chattels, the ownership of which is disputed. (c)

Contracts in Contravention of the Policy of an Act of Parliament, (d) or of the Bankrupt Acts, are illegal and void, such as con-

(t) *Coppock v. Bower*, 4 M. & W. 367.

(u) *Nerot v. Wallace*, 3 T. R. 23; *Coles v. Strick*, 15 Q. B. 9; *Humphreys v. Welling*, 31 L. J. Ex. 33; 1 H. & C. 7.

(x) *Clubb v. Hutson*, 18 C. B. N. S. 414; *Williams v. Bayley*, L. R. 1 H. L. 200; 35 L. J. Ch. 717.

(y) *Harding v. Cooper*, 1 Stark. 467; *Drage v. Ibberson*, 2 Esp. 643.

(z) *Fisher v. Apollinaris Co.*, L. R. Ch. 10, 297.

(a) *Brett v. Close*, 16 East, 300; *Sugars v. Brinkworth*, 4 Campb. 46;

Pilkington v. Green, 2 B. & P. 151.

(b) *Blithman v. Martin*, 2 Bulstr. 213; *Wright v. Lord Verney*, 3 Doug. 240; *Morris v. Chapman*, T. Jones, 24; *Hughes v. Statham*, 4 B. & C. 187; 6 D. & R. 219.

(c) *Atkinson on Sheriffs*.

(d) *Macgregor v. S. E. R. Co.*, 18 Q. B. 618; 22 L. J. Q. B. 69.

tracts and securities for the payment of money to a particular creditor to induce him to withdraw his opposition to a bankrupt's discharge, (*e*) or to sign a bankrupt's certificate, or not to take steps to oppose such certificate, (*f*) or to abandon proceedings in bankruptcy, (*g*) or to secure to a particular creditor a superior claim or preference in respect of the future property of [* 1143] the bankrupt, (*h*) * or a greater share of the dividends of a bankrupt's estate, (*i*) or some additional advantage which prevents the property being distributed under the bankruptcy laws, (*k*) or to omit a debt from a bankrupt's schedule, in order that the creditor may, after the bankruptcy, claim the amount from the bankrupt; (*l*) and so also are all agreements tending to induce the officers of the court or trustees not to do their duty. (*m*) Any *cessio bonorum* made by an insolvent on the eve of bankruptcy for the benefit of some creditors to the exclusion of others, or any scheme or arrangement made for the distribution of the assets by such person otherwise than according to the provisions of the bankruptcy law, is a plain and palpable fraud on the bankruptcy laws, a plain and palpable fraud upon the creditors who are excluded or disappointed, or who may be delayed or hindered thereby. (*n*) A covenant or agreement to pay all the creditors their debts in full, in consideration that they will not proceed farther under the bankruptcy, is of course perfectly legal; and so is a guarantee to a petitioning creditor, securing to him a dividend of a certain amount on his debt, as an inducement to him to incur the expense and trouble of suing for an adjudication. But if the bankruptcy is a concerted bankruptcy, and there is anything fraudulent or underhand in the

(*e*) *Jackson v. Davison*, 4 B. & Ald. 695; *Rogers v. Kingston*, 10 Moore, 102; 2 Bing. 441; *Murray v. Reeves*, 8 B. & C. 425; *Hall v. Dyson*, 16 Jur. 270; 21 L. J. Q. B. 224; *Hills v. Mitson*, 8 Exch. 758.

(*f*) *Birch v. Jervis*, 3 C. & P. 379

(*g*) *Davis v. Holding*, 1 M. & W. 164.

(*h*) *Alsager v. Spalding*, 4 Bing. N. C. 407; 6 Sc. 204; *Rose v. Main*, 1 Sc. 127; 1 Bing. N. C. 357.

(*i*) *Staines v. Wainwright*, 6 Bing. N. C. 179; 8 Sc. 280.

(*k*) *Ex parte Mackay*, in *re Jeavons*, L. R. 8 Ch. 643; *Ex parte Williams*, 7 Ch. D. 138, C. A.

(*l*) If the creditor is a party to the omission of the debt, he cannot afterward recover the amount. *Tabram v. Freeman*, 4 B. & Ad. 887; 2 C. & M. 451.

(*m*) *Nerot v. Wallace*, 3 T. R. 26; *M'Neill v. Cahill*, 2 Bligh, 329.

(*n*) *Ex parte Saffery*, 4 Ch. D. 555.

proceeding, the contract will be illegal and void. (o) By the 32 & 33 Vict. c. 71, sect. 92, every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered, by any person unable to pay his debts as they become due from his own moneys, in favor of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, is (if the person making, taking, paying, or suffering the same, become bankrupt within three months after the date of making, taking, paying, or suffering the same) to be deemed fraudulent and void as against the trustee of the bankrupt under that act; but the section is not to affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration. A bill of exchange given as an inducement not to oppose the last examination was held not to be within the 12 & 13 Vict. c. 106, sect. 202 (repealed). (p)

* A secret agreement by a shareholder in a company [* 1144] which is being compulsorily wound up that he will endeavor to postpone the making of a call, or will support the claim of a creditor, is illegal, as being contrary to the policy of the Winding-up Acts. (q)

Contracts for the Evasion of the Registry, Licensing, and Excise Acts are null and void. The customs laws are now consolidated in the 39 & 40 Vict. c. 36, amended by 41 Vict. c. 15. (r) An agreement that articles of apprenticeship shall be antedated, to make it appear that an apprentice has been articulated for the full term required by the statute, is null and void; and so is a bond given to secure payment of the premium in respect of such apprenticeship. (s) Where three persons agreed to purchase a ship, to have it registered in the name of two of them only, and to divide the profits and earnings of the ship between the three, it was held that the contract could not be enforced, as it was in direct contravention of the registry acts. (t) Leases of premises

(o) *Kaye v. Bolton*, 6 T. R. 134;
Fry v. Malcolm, 5 Taunt. 117.

(r) See *post*, p. * 1162, as to Excise.

(p) *Taylor v. Wilson*, 5 Exch. 251;
 19 L. J. Ex. 241.

(s) *Prole v. Wiggins*, 3 Sc. 607; 3
 Bing. N. C. 230.

(q) *Elliott v. Richardson*, L. R. 5
 C. P. 744; 39 L. J. C. P. 140.

(t) *Battersby v. Smyth*, 3 Mad. 110.

to be used in contravention of the excise laws or licensing acts, or the provisions of a building act, or a health of towns act, or any local, public act of parliament, (*u*) are illegal and void, if the lessors knew that the premises were to be used for the forbidden purpose. Whenever a license is required for the exercise of a trade on grounds of public policy, any agreement made with the view of enabling a party to trade without the license is null and void. (*x*)

Parish Indemnities. — A security given to overseers to indemnify the parish against charges to which it may be subject by the birth of an illegitimate child therein is not illegal; (*y*) nor is a covenant with a lessor of premises in a parish to indemnify the churchwardens and overseers of the poor of the parish, and the inhabitants thereof, from all charges resulting from the covenantor's taking apprentices or servants who should thereby gain a settlement within, or become chargeable to the parish. (*z*)

Sale of Letters of Recommendation and Public Offices of Trust. — All contracts and agreements to pay money to ministers of state for an appointment to a public office of trust, or for the grant of favors from the crown, (*a*) or for an appointment in the dockyard, the crown being kept in ignorance of the bargain, are absolutely null and void, as being contrary to public policy.

But if the office is an acknowledged salable office, and [* 1145] the * transaction is carried on under public authority, and with the knowledge and consent of the crown, and of the parties who have the office in their gift, as was formerly the case with sales of commissions in the army, the transaction is lawful, and the contract growing out of it may be enforced. The fellow of a college may assign and mortgage the income and profits of his fellowship, although the assignment may be a violation of his duty to the college; (*b*) and it was also held that the clerk to the deputy registrar in the Prerogative Court of

(*u*) *Gas-light & Coke Co. v. Turner*,
5 Bing. N. C. 666.

(*x*) *Ritchie v. Smith*, 6 C. B. 474; 18
L. J. C. P. 9.

(*y*) *Cole v. Gower*, 6 East, 110.

(*z*) *Walsh v. Fussell*, 3 M. & P. 457;
6 Bing. 163.

(*a*) *Hanington v. Du Chatel*, 1 Bro.
C. C. 124; *Morris v. M'Culloch*, Amb.
435.

(*b*) *Feistel v. King's Coll.*, 16 L. J.
Ch. 339.

Canterbury might likewise charge or alien the income and profits of his office. (c) Exchanges of public offices, and substitutions of one person in the place of another, are lawful when they are made with the knowledge and sanction of the public authorities and the parties who have the regulation and disposal of such offices; but secret and underhand agreements for exchanges of such offices are contrary to public policy, and are consequently void. (d)

Contracts in Fraud of Masters and Employers. — All contracts and agreements to recommend parties for employment in offices of trust in consideration of the payment of money, or to pay money in consideration of such recommendation, entered into without the knowledge of the employer or person who has the office or employment at his disposal, are a fraud upon the latter, and are null and void. (e) If a party intrusted with the duty of selecting fit and proper persons for certain situations and offices obtain contracts or securities for the payment of money by the applicants after their appointment, without the knowledge of the employer or superior, he is guilty of a gross abuse of the confidence reposed in him, and such agreements cannot for a moment stand. But if the employer is apprised of the whole transaction, it cannot then be considered a fraud on him, although, if the office be a public office, the contract may be void on grounds of public policy (*post*, p. *1148). An agreement to pay money in consideration of a recommendation to the appointment to the command of a vessel, entered into without the knowledge of the shipowners, is fraudulent and void; (f) but if the shipowners are cognizant of the agreement at the time they make the appointment, there is then no fraud in the matter. (g) If a person is employed to puff a particular tradesman, he cannot bring an action against the latter for his commission, if the employment was kept secret from the customers, and they were led to suppose that the recommendation was founded upon the known character * and reputation of the party recommended, [* 1146] and not upon a pecuniary consideration. (h)

(c) *Aston v. Gwinnell*, 3 Y. & J. 136.

(f) *Blachford v. Preston*, 8 T. R. 89;

(d) *Parsons v. Thompson*, 1 H. Bl. 322. *Card v. Hope*, 2 B. & C. 672.

(g) *Richardson v. Mellish*, 2 Bing.

(e) *Waldo v. Martin*, 4 B. & C. 319; 242.

6 D. & R. 364.

(h) *Wybard v. Stanton*, 4 Esp. 179.

Fraud on Creditors.¹—If a debtor induces his creditors to compound their claims and execute a deed of composition for their several debts by concealing from them the true state of his affairs, the deed will be void, and the creditors remitted to their original rights. (i) Whenever creditors enter into a deed of composition with their debtor, whereby they agree to release the latter from his liabilities on payment of a certain ratable proportion of their several claims, any private underhand agreement for securing to any one of the creditors executing the deed any advantage not enjoyed by them all in common, is fraudulent and void. Equality is the only principle that can be applied; and if one creditor, unknown to the other creditors (k), — not unknown to one or two, but to the general body, — enters into an arrangement by which he gets for himself from the debtor, or from any one on behalf of the debtor, any collateral advantage whatever, that arrangement cannot stand. (l) But a payment in excess of the composition made afterward under pressure, and not in pursuance of a previous arrangement, will not avoid the composition. (m) And although a promissory note so given has been dishonored, and an action brought upon it and judgment recovered, yet a guarantee given for the amount of such judgment is tainted with the original fraud, and cannot be enforced, notwithstanding that the illegality might have been, but was not, pleaded to the action. (n) If money is paid to one creditor, unknown to

¹ U. S. Dig. tit. *Fraudulent Conveyances*; also ib. tit. *Assignments, Debtor and Creditor, Fraud, Mortgages*, XII.; Browne, *Statute of Frauds*; Bump, *Fraudulent Conveyances* (3d ed., 1882, is the latest); Burrill on *Assignments*; Herman and Jones, *Chattel Mortgages*; note, 34 Am. Dec. 765; article on *Sales and conveyances without delivery of possession*, 18 Am. L. Reg. n. s. 137; *Butler v. Moore*, 73 Me. 151; *Matthai v. Heather*, 57 Md. 483; *Stimpson v. Wrigley*, 86 N. Y. 332.

As to validity of a voluntary conveyance or transfer as against the maker, see *Atwater v. Seely*, 2 Fed. Reporter, 133; *Bush v. Rogan*, 65 Ga. 320; and who may impeach one, *Bradley v. Luce*, 99 Ill. 234.

(i) *Vine v. Mitchell*, 1 Mood. & Rob. 337; *Wenham v. Fowle*, 3 Dowl. P. C. 43.

(k) *Cockshott v. Bennett*, 2 T. R. 763.

(l) *Jackman v. Mitchell*, 13 Ves. 581; *Jackson v. Lomas*, 4 T. R. 166; *Wells*

v. Girling, 4 Moore, 87; 1 B. & B. 447; *Geere v. Mare*, 2 H. & C. 339; 33 L. J. Ex. 50; *Mare v. Warner*, 3 Giff. 100; *Mare v. Earle*, 3 Giff. 108; *Mackewan v. Sanderson*, L. R. 15 Eq. 229.

(m) *Carey v. Barrett*, 4 C. P. D. 379.

(n) *Clay v. Ray*, 17 C. B. n. s. 188;

the other creditors, it may be recovered back. (*o*) And although he is to receive no more money than the others, yet if the composition is to be paid by instalments, and he secretly bargains for, and obtains, better security for the payment of his own instalments than is possessed by the other creditors, the security so obtained is void. (*p*) And if he has secretly received either goods or money to induce him to compound his claim and join in the execution of the composition deed, he will not be allowed to sue upon the deed for the instalments due to him, or upon any bond or bill of exchange given him to secure the payment of such instalments. (*q*) A bargain by which *a [* 1147] creditor, in consideration of his being a security for the payment to the others of a composition, agreed with the debtor, without the knowledge of the other creditors, for the payment of his own debt in full, was set aside at the instance of the debtor. (*r*) If the creditor keeps back a portion of the debts due to him, and does not correctly state the amount of his claim in the composition deed, his conduct is fraudulent, and he will not be allowed to sue the debtor for the debts omitted. (*s*) If he makes a promise, upon the faith of which the composition proceeds, he will not be permitted to violate his engagement, as his doing so would amount to a fraud upon the other creditors. (*t*)

All the creditors are presumed to compound their claims upon the debtor on the understanding that they are all to receive equal proportions of their several debts; and they all accept the same security for what they are individually to receive. They are, therefore, not fairly dealt by, if any one of them bargains for, or receives, better terms than another. (*u*) But a creditor who holds bills of exchange drawn by the debtor upon, and accepted by, third parties as a security for part of his debt, is entitled to avail himself of the benefit of such securities; and if he

Geere v. Mare, 2 H. & C. 339; 33 L. J. Ex. 50. (*r*) *Wood v. Barker*, L. R. 1 Eq. 139; 35 L. J. Ch. 276.

(*o*) *Alsager v. Spalding*, 4 Bing. N. C. 407; *Atkinson v. Denby*, 7 H. & N. 934; 31 L. J. Ex. 362; *In re Lenzberg's* Policy, 7 Ch. D. 650. (*s*) *Britten v. Hughes*, 3 M. & P. 77; 5 Bing. 460.

(*p*) *Leicester v. Rose*, 4 East, 381. (*t*) *Clark v. Upton*, 3 M. & R. 89.

(*q*) *Knight v. Hunt*, 3 M. & P. 18; 5 Bing. 432. (*u*) *Lewis v. Jones*, 4 B. & C. 511; 6 D. & R. 567; *Coleman v. Waller*, 3 Y. & J. 217.

claims the whole of his debt under the composition deed in the first instance, and then receives the amount due upon the bills, he is entitled to his composition upon the residue of his demand. (x) The omission to state the amount of the debt in the deed will not avoid the contract as regards the creditor whose debt has been so omitted to be stated; but the amount of the debt may be proved by extrinsic testimony. (y)

Contracts made illegal by Statutes.¹—Everything in respect of which a penalty is imposed by statute must be taken to be a

¹ According to the majority of American decisions, a contract founded directly on a consideration which is rendered illegal by statute, is void, whether the illegal act is in terms prohibited, or is only punished with a penalty. *Stanley v. Nelson*, 28 Ala. 514; *Milton v. Haden*, 32 Ala. 30; *Madison Ins. Co. v. Forsyth*, 2 Ind. 483; *Siter v. Sheets*, 7 Ind. 132; *Ellsworth v. Mitchell*, 31 Me. 247; *Hall v. Mullin*, 5 Har. & J. 193; *Bayley v. Taber*, 5 Mass. 286; *Wheeler v. Russell*, 17 Mass. 258; *Farrar v. Barton*, 5 Mass. 395; *Roby v. West*, 4 N. H. 285; *Nourse v. Pope*, 13 Allen, 87; *Solomon v. Dreschler*, 4 Minn. 278; *Downing v. Ringer*, 7 Mo. 585; *Carlton v. Whitcher*, 5 N. H. 196; *Bracket v. Hoyt*, 29 N. H. 264; *Coburn v. Odell*, 30 N. H. 540; *Bell v. Quin*, 2 Sandf. 146; *Seidenbender v. Charles*, 4 Serg. & R. 159; *Mitchell v. Smith*, 1 Binn. 118; *Mabin v. Coulon*, 4 Dall. 298; *Biddis v. James*, 6 Binn. 321; *Hale v. Henderson*, 4 Humph. 199; *Elkins v. Parkhurst*, 17 Vt. 105; *Spalding v. Preston*, 21 Vt. 9; *Territt v. Bartlett*, ib. 184; *Bank of Rutland v. Parsons*, ib. 199; *Bancroft v. Dumar*, ib. 456.

See numerous illustrations of this general doctrine, U. S. Dig. tit. *Contracts*, sects. 1385-1440. But compare *Branch Bank v. Crocheron*, 5 Ala. 250; *Hill v. Smith*, 1 Morr. 70; *Lindsey v. Rutherford*, 17 B. Mon. 245; also *Vining v. Bricker*, 14 Ohio St. 331, where it is held that to determine whether a contract made contrary to the provisions of a penal statute is illegal and void, the statute must be considered as a whole, to ascertain whether or not it was the intention of the legislature that the statute should have such effect; *Bemis v. Becker*, 1 Kan. 226, where it is held that contracts in contravention of a statute are not to be held void, unless the court from an examination of the statute shall judge such to have been the intent of the legislature, though such intent will be presumed, unless the contrary can fairly be inferred; also *Schermerhorn v. Talman*, 14 N. Y. 93, and *Tracey v. Talmage*, ib. 162, where it is held that in a transaction prohibited by statute, parties are not necessarily *in pari delicto*, but the party alone is criminal on whom the penalty is imposed, and that unless the parties are *in pari delicto*, as well as *participes criminis*, the court will afford relief to the less guilty party, where equity requires it.

In applying the general doctrine, the contract is to be tested by the law in force at the time when it was made (*Mitchell v. Doggett*, 1 Fla. 356; *McKissick v. McKissick*, 6 Humph. 75; *Murrell v. Jones*, 40 Miss. 565); if it is valid when made, a subsequent change or repeal of the law cannot impair its validity (*Mays v. Williams*, 27 Ala. 267; *Bancher v. Mansel*, 47 Me. 58; *Milne v. Huber*, 3 McLean, 212); and if it is void when made, no subsequent law can impart to it validity

(x) *Thomas v. Courtney*, 1 B. & Ald. 5. (y) *Harry v. Wall*, 1 B. & Ald. 103; *Reay v. White*, 1 C. & M. 748.

thing forbidden; and a contract to do such thing is absolutely void to all intents and purposes whatsoever. (z) Yet where a company illegally borrowed money, it was held that their sureties were liable upon their guarantee to pay the debt. (a) Where the contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not; but in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was an intention to * break the law; and then it [* 1148] becomes important to ascertain whether the parties knew what the law was. (b)

Illegal Contract as to Ground Game.—By the 43 & 44 Vict. c. 47, sect. 3, every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier under that act, or which gives to such occupier any advantage in consider-

(Ib.; *McCauley v. Brooks*, 16 Cal. 11). The general principle, that a promise to do a lawful act which afterward becomes unlawful is void, does not apply to an executed contract (*Bradford v. Jenkins*, 41 Miss. 328); in other words, if an agreement when entered into is legal, and is afterward made by statute illegal, acts done under it while it remained legal are valid (*Bennett v. Woolfolk*, 15 Ga. 213).

See, further, on the general doctrine of contracts contrary to a statute, *Wood Mowing, &c. Co. v. Caldwell*, 16 Am. L. Reg. n. s. 554, and note, ib. 563; *Penn. v. Bornman*, 102 Ill. 523.

In respect to corporate contracts, the general American doctrine repudiates the view that the contract must be repugnant to the charter or to some statute, in order to be invalid, and requires whoever claims under a contract of a corporation to show that the company was authorized, either by express law or fair implication, to make it. See *Thomas v. Railroad Co.*, 101 U. S. 71; *Field, Ultra Vires*; *Abb. Dig. Corp. tit. Ultra Vires*; articles on *Ultra Vires*, 16 Am. L. Reg. n. s. 513; 11 Cent. L. J. 81, ib. 101; 5 South. L. Rev. n. s. 400. But compare *Bradley v. Ballard*, 55 Ill. 413; *East St. Louis v. East St. Louis Gas Light, &c. Co.*, 98 Ill. 415; *Booth v. Robinson*, 55 Md. 419.

Lease by railroad company of road and franchise void, unless specially authorized. See article on Statutory provisions for leasing railroad, 14 Cent. L. J. 485; *Thomas v. Rail Road Co.*, 101 U. S. 71; *Farmers' Loan, &c. Co. v. St. Joseph, &c. R. R. Co.*, 2 Fed. Reporter, 117; *Troy, &c. R. R. Co. v. Boston, &c. R. R. Co.*, 86 N. Y. 107.

(z) *Chambers v. Manchester & Milford Ry. Co.*, 5 B. & S. 588; 33 L. J. Q. B. 268; *In re Cork & Youghal Ry. Co.*, L. R. 4 Ch. 748; 39 L. J. Ch. 277.

(a) *Yorkshire Ry. Wagon Co. v.*

Maclure, 19 Ch. D. 478; see *ante*, p. *825.

(b) *Waugh v. Morris*, L. R. 8 Q. B. 202, 208, *per Blackburn, J.* The sale of gunpowder is regulated by the 38 Vict. c. 17, sects. 30-32; and as to other explosives, see sect. 39 (8), sect. 43.

ation of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, is void.

Illegal Sale of Offices. — By the 5 & 6 Edw. VI. c. 16, sects. 2, 3, and the 49 Geo. III. c. 126, it is enacted that all contracts for money or profit, relating to appointments touching the administration of justice, or the collection of the revenue, or to any office in the gift of the crown, and any commission, civil, naval, or military, and any place or employment in any public department or office of government, shall be void. But it was provided (sect. 7) that the statute should not extend to any purchase or sale, or agreement for the purchase or sale, of certain specified offices in the palace, or commissions in the army, at the regulated prices. *(c)* All assignments, trusts, and money bargains, therefore, respecting cadetships, places, and public offices, are illegal and void. *(d)* The offices of sub-distributor of stamps and collector of taxes are within the statute, both of them being connected with the receipt of the revenue; *(e)* but the office of clerk to the deputy registrar in the Prerogative Court of Canterbury was held not to be an office within the act, *(f)* nor the office of clerk to assessed tax commissioners, or of clerk to commissioners of sewers, *(g)* nor the fellowship of a college. *(h)* The appointment of a deputy to fulfil the duties of a public office at a fixed salary, the deputy paying over the fees and emoluments of the office to the principal, is of course perfectly legal, where the business of the office can be lawfully transacted by the deputy; but if the deputy takes the fees and emoluments of the office, and pays a fixed sum annually to the principal for the post, the deputation of the office and the contract to pay the money are illegal and void. *(i)*

(c) The section is now repealed, Stat. Law Rev. 1872, No. 2. The sale of commissions is now illegal. See 34 & 35 Vict. c. 86 (preamble).

(d) *Graeme v. Wroughton*, 24 L. J. Ex. 265; *Lee v. Coleshill*, Cro. Eliz. 529; *Stackpole v. Earle*, 2 Wils. 133; *Garforth v. Fearon*, 1 H. Bl. 328; *Palmer v. Bate*, 2 B. & B. 673; *Parker v. Brown*, Cro. Jac. 612; *Reg. v. Charretie*, 18 L. J. M. C. 151; 13 Q. B. 447.

(e) *Hopkins v. Prescott*, 16 L. J. C. P. 259; 4 C. B. 578.

(f) *Austin v. Gwinnell*, 3 Y. & J. 136.

(g) *Sterry v. Clifton*, 9 C. B. 110; 19 L. J. C. P. 237.

(h) *Feistel v. King's College*, 16 L. J. Ch. 339.

(i) *Godolphin v. Tudor*, 2 Salk. 468; *Gulliford v. De Cardonell*, ib. 466; 1 Bro. P. C. 135; *Greville v. Atkins*, 9 B. & C. 462; 4 M. & R. 372.

Sale of Pensions. — An assignment by a retired military officer * of his pension for valuable consideration, [* 1149] was void under the 47 Geo. III. c. 25. (*k*) But an assignment of a pension granted by the late East India Company was held valid. (*l*) And so was an assignment of a pension payable to a former officer of the East India Company out of the revenues of India. (*m*)

Simoniacal Contracts. — By the 31 Eliz. c. 6, sect. 5, it is enacted that if any person, body politic or corporate, shall for money, reward, &c., or for any promise or contract for money, &c., present to any benefice with cure of souls, prebend, or any ecclesiastical living or dignity, the presentation, and every admission or investiture thereupon made, shall be utterly void. A penalty is imposed upon the parties to such a transaction, and upon every person who receives money or reward, or accepts a promise thereof, to admit or induct any person into any benefice or ecclesiastical dignity. Penalties are also imposed upon persons who resign or exchange benefices with cure of souls for money, reward, or benefit. And by the 12 Anne, st. 2, c. 12, it is enacted that if any person, for money, reward, &c., or by reason of any promise of money, &c., directly or indirectly procures or accepts the next avoidance or presentation to any benefice, &c., and shall be presented thereupon, such presentation shall be void, and the agreement shall be deemed to be a simoniacal contract. (*n*)

The statutes against simony do not interfere with or prohibit the sale of an advowson or the right of presentation to a living or benefice which is filled at the time of the sale; but the object of them is to restrain a patron who possesses the right of presenting at a vacancy from being influenced in the choice of his presentee by a bribe or benefit to himself. An agreement, however, for the sale of an advowson, containing a stipulation that the vendor should pay interest until the benefice became vacant, the incumbent being a son of the vendor, but not being a party

(*k*) *Lloyd v. Cheetham*, 3 Giff. 171.
This act is repealed; see 44 & 45 Vict.
c. 58, 5th. sch.

(*l*) *Heald v. Hay*, 3 Giff. 467.

(*m*) *Carew v. Cooper*, 4 Giff. 619.

(*n*) See the 32 & 33 Vict. c. 94, sects.
12, 13, as to contracts under the provi-
sions of the Church Building Acts and
New Parishes Acts relative to rights of
presentation.

to the contract, was held not to be simoniacal. (*o*) If an advowson is sold or transferred during a vacancy of the benefice, the presentation upon that vacancy does not pass by the grant. It is a fruit fallen or chose in action vested in the patron, which cannot legally be sold or transferred by him; (*p*) and if it is provided in any part of the contract that the right of presentation which has then accrued shall be exercised by the late patron in favor of a nominee of the purchaser or of any particular individual, the whole contract is simoniacal and void. If [* 1150] the incumbent of a * living is sick and dying, and the next presentation is purchased with intent to present a particular person as soon as the expected vacancy occurs, the purchase is simoniacal and void. But not if it is made without the privity of, and without a view to the nomination of, the clerk afterward appointed. (*q*) An agreement upon an exchange of livings that neither party should pay for dilapidations was held not to be simoniacal and not contrary to the policy of the Ecclesiastical Dilapidations Act. (*r*)

Resigning and Charging Benefices. — A bond given by an incumbent for the resignation of his benefice on notice or request generally, or in favor of a particular person named in the bond, as soon as the latter should become qualified for admission or induction to such benefice, has been held void, as "coming as near simony as possible." (*s*) An act of parliament, however, has been passed (9 Geo. IV. c. 94), legalizing bonds of this description. By the 13 Eliz. c. 20, it is enacted that all charging of benefices with any pension or profit to be taken out of the same, other than rents to be reserved upon leases as therein mentioned, shall be utterly void. Under this statute it has been held that a demise of the glebe by the incumbent of a benefice, to secure an annuity, is void; (*t*) also an agreement by a clergyman to appropriate the future profits of his living to the payment of his debts, reserving thereout a competent stipend to a

(*o*) *Sweet v. Meredith*, 3 Giff. 610; 32 L. J. Ch. 147.

(*p*) *Leak v. Babington*, Cro. Eliz. 811.

(*q*) *Sheldon v. Brett*, Winch. 63; *Fox v. Bishop of Chester*, 6 Bing. 1; 1 Dow & C. 416.

(*r*) *Wright v. Davies*, 1 C. P. D. 638, C. A.; 34 & 35 Vict. c. 43.

(*s*) *Fletcher v. Ld. Sondes*, 3 Bing. 501.

(*t*) *Shaw v. Pritchard*, 5 M. & R. 180; 10 B. & C. 241.

curate to serve the church; (*u*) also a warrant of attorney which appears on the face of it to be an authority for the sequestration of a living and the appropriation of the profits in discharge of a debt due from the incumbent. (*x*) But a warrant of attorney to enter up judgment against the incumbent, given with a defeasance in the usual form, and not charging the benefice in express terms, is not void, (*y*) although it may refer on the face of it to a void deed charging the benefice, and may appear to be given as a collateral security for the same debt. (*z*) A mortgage of pew rents made by the vicar of a district church is void under this act. (*a*)

Contracts in General Restraint of Industry and Trade, preventing parties from gaining a livelihood in any particular vocation or profession, are absolutely null and void, as being contrary to public policy. (*b*) In the reign of Henry V., a plaintiff brought *an action against a dyer upon a bond [* 1151] whereby the latter bound himself not to use or exercise his craft or trade of dyeing, and Hull, J., as soon as he heard the bond read, declared that it was contrary to the common law, and swore on the bench that, if the plaintiff had been present in court, he would have sent him to prison until he had paid a fine to the king. (*c*) "I might as well bind myself," observes Anderson, J., "not to go to church." (*d*) If the restraint is general, and not confined to any particular district or locality, the shortness of time for which it is imposed will not make it good. Therefore, where a coal-merchant's clerk and traveller bound himself "not to follow or be employed in the business of a coal-merchant for the space of nine months after he should have left the service of his employer, it was held that the bond was void." (*e*) It

(*u*) *Alchin v. Hopkins*, 4 M. & Sc. 615; 1 Bing. N. C. 99.

(*x*) *Newland v. Watkin*, 2 M. & Sc. 174; 9 Bing. 113; *Saltmarsh v. Hewett*, 3 N. & M. 656; 1 Ad. & E. 812.

(*y*) *Moore v. Ramsden*, 7 Ad. & E. 907; 3 N. & P. 180.

(*z*) *Colebrook v. Layton*, 4 B. & Ad. 578; 1 N. & M. 374; *Bendry v. Price*, 7 Dowl. P. C. 753; *Bishop v. Hatch*, ib. 763.

(*a*) *Ex parte Arrowsmith*, 8 Ch. D. 96.

(*b*) *Thompson v. Harvey*, 1 Show. 2; Com. Dig. Trade, 3; *Gunmaker's Co. v. Fell*, Willes, 389; *Tailors of Lichfield's case*, 11 Co. 53 a; *Hinde v. Gray*, 1 M. & Gr. 195; 1 Sc. N. R. 123.

(*c*) 2 Hen. V. fol. 5, pl. 26.

(*d*) *Claygate v. Batchelor*, Owen, 143.

(*e*) *Ward v. Byrne*, 5 M. & W. 548; *Allsop v. Wheatcroft*, L. R. 15 Eq. 59.

seems, however, that an unlimited restraint will be valid if from the circumstances it appears to be reasonably necessary for the protection of the covenantee. (*f*) Contracts also whereby certain master manufacturers mutually bind themselves to close their works at the will of a majority are contracts in restraint of trade, and therefore null and void. (*g*) And so are contracts by which men bind themselves not to work except under certain conditions, and to support one another, in the event of being thrown out of employment, in carrying out the views of the majority. (*h*)

Trades Unions. — By the 34 & 35 Vict. c. 31, sect. 3, the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust. But by sect. 4, nothing in that act is to enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of, — 1st, any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ or be employed; 2d, any agreement for the payment by any person of any subscription or penalty to a trade union; 3d, any agreement for the application of the funds of a trade union to provide benefits to members, or to furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the [* 1152] rules and resolutions * of such trade union, or to discharge any fine imposed upon any person by sentence of a court of justice; 4th, any agreement made between one trade union and another; 5th, any bond to secure the performance of any of the above-mentioned agreements. But nothing in that section is to be deemed to constitute any of the above-mentioned agreements unlawful. An action brought to enforce an agreement between members of a trade union “to provide

(*f*) See *per* Fry, J., *Rousillon v.* 47; 24 L. J. Q. B. 353; 25 L. J. Q. B. Rousillon, 14 Ch. D. 351. 199.

(*g*) *Hilton v. Eckersley*, 6 Ell. & Bl.

(*h*) *Hornby v. Close*, L. R. 2 Q. B. 153.

benefits to members" within the above section was held not maintainable where the agreement was not enforceable without the act. (i)

Contracts restraining the Exercise of a Trade or Profession in Particular Localities¹ are good and valid when there is a fair and reasonable ground for the restriction, as in the case of the sale of the good-will of a trade or business carried on in a particular locality, where the vendor covenants or agrees not to carry on the same business on the same spot in opposition to the purchaser; (k) or the taking or continuing in his engagement (l) of an apprentice or servant, clerk or traveller, upon the terms that he shall not, during or after the termination of his engagement, solicit custom from the master's customers, (m) or set up the same trade, craft, or profession in opposition to his employer in his immediate neighborhood, or in the district over which the master's business extends; (n) or the formation or dissolution of a partnership, or the retirement of one of the members of a firm, upon the terms, and subject to an agreement, that he will not at any time be a competitor with the remaining partners, or any new partners or assignees, in the district where the business is carried on. (o) Where the contract is reasonable, the courts will prevent any infringement of it, although a pecuniary penalty in the case of a breach may have been stipulated for in the agreement. (p) A trader "may sell a secret of business,

¹ U. S. Dig. tit. *Contracts*, sect. 1332; *Roussillon v. Roussillon*, 19 Am. L. Reg. n. s. 748, and note by E. H. Bennett, ib. 761; *Wiggins Ferry Co. v. Chicago, &c. R. R. Co.*, 73 Mo. 389.

(i) *Rigby v. Connol*, 14 Ch. D. 482. Cummings, 17 L. J. C. P. 84; 5 C. B. 247.
 (k) *Prugnell v. Gosse*, Aleyn, 67; *Broad v. Jollyffe*, Cro. Jac. 596; *Jollie & Broad's case*, 2 Rolle R. 201; *Mitchell v. Reynolds*, 1 P. Wms. 181; 1 Smith's L. C. 340, 5th ed.; *Archer v. Marsh*, 6 Ad. & E. 959; *Jones v. Lees*, 1 H. & N. 189.
 (l) *Graveley v. Barnard*, L. R. 18 Eq. 518.
 (m) *Rannie v. Irvine*, 8 Sc. N. R. 674; 7 M. & Gr. 969; *Huntstocke v. Blacklowe*, 2 Wms. Saund. 156; *Homer v. Ashford*, 11 Moore, 101; *Hartley v.*
 (n) *Chesman v. Nainby*, 2 Ld. Raym. 1456; 2 Str. 739; *Nicholls v. Stretton*, 7 Beav. 42; *Sainter v. Ferguson*, 7 C. B. 716; 18 L. J. C. P. 217; *Denby v. Henderson*, 11 Exch. 194; *Benwell v. Inns*, 26 L. J. Ch. 663.
 (o) *Gale v. Reed*, 8 East, 80; *Leighton v. Wales*, 3 M. & W. 545.
 (p) *Fox v. Scard*, 33 Beav. 327; *Howard v. Woodward*, 34 L. J. Ch. 47. But see *Carnes v. Nisbett*, 7 H. & N. 678; 31 L. J. Ex. 273.

and restrain himself generally from using that secret ;" (*g*) and railway companies and other parties engaged in trade [* 1153] may lawfully agree that one company * shall not compete or interfere with the other upon a particular line of railway. (*r*) An agreement made by several persons to parcel out the stevedoring business of a particular port amongst themselves, and so to prevent competition amongst themselves, and keep up prices, was held to be good. (*s*) But the restraint must be confined within reasonable limits ; for where it is larger and wider than is necessary for the protection of the party with whom the contract is made, it is illegal, and the contract is void. (*t*) It has been held that the limit of a provincial town, and ten or twenty miles round it, is not too large for such a profession as a surgeon, apothecary, and man-midwife ; (*u*) five miles from Northampton Square, in the county of Middlesex, in the case of a milkman and cowkeeper ; (*x*) one mile in the case of a fruiterer ; (*y*) and that the wide ambit of the metropolis is not too large for such a profession as that of a dentist ; nor even " London and one hundred and fifty miles from thence," for the profession of a solicitor, (*z*) or a canvassing publisher ; (*a*) nor Birmingham and two hundred miles from thence, in the case of a horse-hair manufacturer. (*b*) But a restraint extending over so large a district seems to be at variance with the ancient policy of the common law in respect of " restraint of trade," and to overrule some earlier decisions holding that a restraint extending over so wide an area is void, on the ground that the employer shuts out the assistant from a larger field of exertion than can by possibility be beneficially occupied by himself. (*c*) " Six hundred miles from any particular spot in this kingdom

(*g*) *V. C. Leach, Byson v. Whitehead*, 1 Sim. & Stu. 77 ; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345 ; 39 L. J. Ch. 86.

(*r*) *Shrews. & Birm. Ry. Co. v. Lond. & N. W. Ry. Co.*, 21 L. J. Q. B. 89.

(*s*) *Collins v. Locke*, 4 Ap. Cas. 674.

(*t*) *Hitchcock v. Coker*, 6 Ad. & E. 454.

(*u*) *Davis v. Mason*, 5 T. R. 118 ; *Atkyns v. Kinnier*, 4 Exch. 776 ; 19

L. J. Ex. 134 ; *Carnes v. Nisbett*, *ante*, p. * 1152.

(*x*) *Proctor v. Sargent*, 2 M. & Gr. 20 ; 2 Sc. 289.

(*y*) *Pemberton v. Vaughan*, 16 L. J. Q. B. 161.

(*z*) *Bunn v. Guy*, 4 East, 190.

(*a*) *Tallis v. Tallis*, 22 L. J. Q. B. 185 ; *Horne v. Graves*, 7 Bing. 735.

(*b*) *Harms v. Parsons*, 32 Beav. 328 ; 32 L. J. Ch. 247.

(*c*) *Mallan v. May*, 11 M. & W. 668.

is out of all reason, and absolutely void." (d) In one case it has been held that the reasonableness of the restriction, and its consequent validity, depend upon the extent and not the populousness of the district. In another, that both the superficial area and the amount of the population are to be taken into consideration.

When the restraint is limited in point of space, the limit is to be measured by a straight line drawn upon the horizontal plane from point to point. (e) If the restraint is reasonable as to space, the circumstance that it is indefinite in point of time will not *affect its validity. (f) The cause or [* 1154] consideration for the restraint must be disclosed upon the face of the contract, as the courts will not, it seems, permit the reason or ground for it, however partial or slight the restraint may be, to be supplied by evidence outside the contract. If the restraint merely appears, without anything to show it to be reasonable and proper, the contract is invalid, whether it be under seal, or whether it be a simple contract only. The court, and not the jury, are to judge of the circumstances and the reasonableness of the restraint, and determine whether the contract is valid or not. (g)

If one man binds himself to serve another for a particular period, and not to carry on or exercise the business of his employers within ten miles of their place of business, the restriction will be confined to the period of service, (h) unless the entire services of the servant are by the contract to be devoted to the employer; and the restriction is manifestly intended to come into operation when he leaves the service, and is his own master. (i) A person who has covenanted not to trade within certain reasonable limits is bound by his covenant, although the covenantee may have ceased both by himself and by his agents,

(d) *Price v. Green*, 16 M. & W. 346; 10 L. J. Ex. 108.

(e) *Lake v. Butler*, 5 El. & Bl. 92; 24 L. J. Q. B. 273; *Duignan v. Walker*, 28 L. J. Ch. 867; *Mouffet v. Cole*, L. R. 7 Ex. 70; *ib.* 8 Ex. 32; 41 L. J. Ex. 28; 42 L. J. Ex. 8.

(f) *Catt v. Tourle*, L. R. 4 Ch. 654; 38 L. J. Ch. 665.

(g) *Homer v. Ashford*, 11 Moore, 103; *Hutton v. Parker*, 7 Dowl. P. C. 739; *Mallan v. May*, 11 M. & W. 665.

(h) *King v. Hansell*, 5 H. & N. 106. (i) *Mumford v. Gething*, 29 L. J. C. P. 105; 7 C. B. n. s. 305.

licensees, or assigns, to carry on the trade. (*k*) He is responsible if he serves customers within the prohibited limits, although he has no residence, shop, or place of business within them. (*l*) Where there was a covenant not to be concerned in carrying on, either directly or indirectly, or to sell any goods in any way connected with, a trade, it was held to be broken by selling goods as a journeyman in the employment of another carrying on that trade. (*m*) There is not any implied covenant or promise on the part of a vendor or assignor of the good-will of a business not to set up the same trade in opposition to the purchaser in the neighborhood of the spot where the business is carried on; and the courts will not grant an injunction to prevent the vendor from so doing. (*n*) But they will interfere to prevent his soliciting the customers of the old business to cease dealing with the purchaser, or to give their custom to himself; (*o*) and even (as it was held in one case) to prevent his dealing with them at all; (*p*) but this has been distinctly disapproved of. (*q*)

[* 1155] It has also been held that the rule in **Labouchere v.*

Dawson cannot be extended to compulsory alienation, as where a trustee of a bankrupt sells the business, even if the bankrupt joined in the conveyance; (*r*) and when the business of a firm has been carried on under an adopted name, a person who sells the good-will of the business cannot set up the same business under the same name and style, although he cannot be prevented from using his own name. (*s*) An agreement between several persons carrying on a particular trade in various parts of England, not to interfere with each other in different towns and districts, or become competitors, or undersell one another, in particular localities, is not contrary to public policy, and is, consequently, valid. (*t*) And, lastly, it must be observed that the

(*k*) *Elves v. Crofts*, 10 C. B. 241; 19 L. J. C. P. 389.

(*l*) *Turner v. Evans*, 2 Ell. & Bl. 512; 22 L. J. Q. B. 412; *Brampton v. Beddoes*, 13 C. B. N. S. 538.

(*m*) *Jones v. Heavens*, 5 Ch. D. 636.

(*n*) *Crutwell v. Lye*, 17 Ves. 346; *Walker v. Mottram*, 19 Ch. D. 355.

(*o*) *Labouchere v. Dawson*, L. R. 13 Eq. 322; 41 L. J. Ch. 427.

(*p*) *Ginesi v. Cooper & Co.*, 14 Ch. D. 599; *per Jessell*, M. R.

(*q*) *Leggott v. Barrett*, 15 Ch. D. 306, C. A.

(*r*) *Walker v. Mottram*, 19 Ch. D. 355.

(*s*) *Churton v. Douglas*, 28 L. J. Ch. 841; *Johns*, 174.

(*t*) *Wickens v. Evans*, 3 Y. & J. 330; *Collins v. Locke*, *ante*, p. * 1153.

exercise of the trade or profession in the prohibited district must be shown to have been made in opposition to, and against the will of, the covenantee. If it is done at his request, to aid and assist him, there is not any breach of the covenant. (*u*)

Contracts creating Monopolies,¹ also, are null and void, as being contrary to public policy, (*x*) "which favors free trade, and is against monopoly and ingrossing." (*y*) Contracts between brewers and publicans, restraining the publican from buying beer from any other brewer than the one named in the contract, may be thought to be contrary to the common law, as creating a monopoly; but although these contracts have been censured and disapproved of, they have never been held to be invalid. Before, however, the brewer can recover damages for a breach of the contract by the publican, he must show clearly and satisfactorily that the beer supplied by him was good marketable beer, wholesome and fit to drink, and that the price was reasonable. (*z*) A grant from the crown of the sole use for a reasonable period, of any art invented or first brought into the realm by the grantee, is not void as being contrary to the policy of the common law. (*a*)

Contracts with Foreign Enemies. — All contracts for commercial and trading purposes made between British subjects and the subjects of a sovereign who is at war with this country are null and void, and cannot be enforced in our courts of law on the return of peace, (*b*) unless the contracts have been

¹ A contract by a railroad company giving to a particular telegraph company an exclusive right to run its line of posts and wires along the road-bed of the railroad, is void as against public policy, because tending to restrain trade and create a monopoly. *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160. See *New Jersey, &c. Tel. Co. v. Fire Commissioners of Jersey City*, 34 N. J. Eq. 117, for a like decision against a similar exclusive privilege given in city streets.

(*u*) *Rawlinson v. Clarke*, 14 M. & W. 191. (*ton v. Sherratt*, 8 Taunt. 530; *Luker v. Dennis*, 7 Ch. D. 227.

(*x*) 3 Inst. 181; 21 Jac. I. c. 3.

(*y*) *East Ind. Co. v. Sandys*, Skin. 86 b; Com. Dig. *Trade* (D 4); 21 Jac. 169; *Darcy v. Allen*, Moore, 671; The case of Monopolies, 11 Co. 86 b; Com. Dig. *Trade* (D 4). (*a*) The case of Monopolies, 11 Co. 86 b; Com. Dig. *Trade* (D 4); 21 Jac. I. c. 3, sect. 6; *Duvergier v. Fellows*, 10 B. & C. 829.

(*z*) *Holcombe v. Hewson*, 2 Campb. 391; *Jones v. Edney*, 3 ib. 285; *Thorn-* (*b*) *Potts v. Bell*, 8 T. R. 548; *Or-*
den *v. Peele*, 8 D. & R. 1; *Bell v. Reid*, 1 M. & S. 731; *Furtado v. Rodgers*, 3 B. & P. 20.

[* 1156] made pursuant * to a license to trade granted by the crown. (c) The effect of a license authorizing an alien enemy to trade with this country is to legalize the commerce comprehended in the license, and all usual and requisite contracts entered into for carrying on such licensed trade. The alien licensee, consequently, may sue and be sued in respect of such contracts, just the same as if he were a natural-born subject. (d) A contract between two subjects of a neutral state to export contraband of war to a belligerent is lawful, and may be enforced in the courts of the neutral state. (e)

Stock-Jobbing. — The 7 Geo. II. c. 8, and the 10 Geo. II. c. 8, passed to prevent the practice of stock-jobbing, have been repealed by the 23 Vict. c. 28, on the ground that they impose unnecessary restrictions on the making of contracts for the sale and transfer of public stocks and securities.

Gaming Contracts and Wagers.¹ — By the 8 & 9 Vict. c. 109, sect. 18, it is enacted that all contracts or agreements by way of gaming or wagering shall be null and void; and that no action or suit shall be brought or maintained for recovering money or any valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made; but it is pro-

¹ What are wagers, bets, gaming, and gambling, see Abb. L. Dict. Their unlawfulness, and the invalidity of contracts involving either, U. S. Dig. tit. *Gaming; Wager*; also ib. tit. *Bills and Notes*, sect. 844; *Insurance*, sects. 102, 760; Ann. Dig. tit. *Gaming; Wager*; *State v. Smith*, Meigs, 99, 33 Am. Dec. 132, and note on What is Gaming, &c., ib. 134; article on Wagers on Horse-races, 25 Alb. L. J. 404; *Wilson v. Conlin*, 18 Am. L. Reg. x. s. 490, and note by M. D. Ewell, ib. 494; *Bartlett v. Smith*, 13 Fed. Reporter, 263; *Hatch v. Douglas*, 48 Conn. 116; *Dickson v. Thomas*, 97 Pa. St. 278.

As to optional contracts, — "grain options," "grain corners," and the like, — see note on Optional contracts, 39 Am. Dec. 152; *Sawyer v. Taggart*, 18 Am. L. Reg. x. s. 222, and note, ib. 229; *Thacker v. Hardy*, ib. 254, and note by E. H. Bennett, ib. 258; *Third Nat. Bank v. Harrison*, 10 Fed. Reporter, 243; *Melchert v. American Union Tel. Co.*, 11 Fed. Reporter, 193, and note by F. Wharton, ib. 201; *Jackson v. Foote*, 12 Fed. Reporter, 37; *Wright v. Crabbs*, 78 Ind. 487; *Barnard v. Backhaus*, 52 Wis. 593.

(c) *Flindt v. Scott*, 15 East, 525; 5 Fenton v. Pearson, 15 East, 426; Morgan v. Oswald, 3 Taunt. 568.

Taunt. 674; *Vaughan v. Lemcke*, 7 D. & R. 236; 8 Moore, 646.

(e) *Ex parte Chavasse, in re Grazebrook*, 34 L. J. Bk. 17; *The Helen*, 35 L. J. Adm. 2; L. R. 1 Adm. 1.

(d) *Usparicha v. Noble*, 13 East, 340;

vided that the prohibition of gaming or wagering contracts therein contained shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money, to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise. An agreement between two persons, each of whom is possessed of a horse, to ride a race, the winner to have both horses, is an agreement by way of wagering, and not an agreement to contribute towards a prize to be awarded to the winner of a lawful game, and is therefore null and void. (*f*) Where there was an agreement to walk a match for £200 a side, and the money was deposited with a stakeholder, it was held to be a wager within the statute, but that although the winner, as such, could not sue the loser or stakeholder, yet the loser as depositor might recover back his share. (*g*) So also where it was agreed between the plaintiff and the defendant that the plaintiff should * have £2 on a horse at 25 to 1, and the [* 1157] horse won, and the plaintiff claimed £50 from the defendant, this was held to be within the statute. (*h*) But where the defendant had given a cheque to the plaintiff in respect of such winnings, it was held that the plaintiff could recover on the cheque. (*i*) Where only two persons contribute towards a game, sport, pastime, or exercise, it seems there can be a winner within the above proviso. (*k*) But where two persons agree that one shall engage to ride a horse so many miles in so many hours, this is not within the proviso. (*l*) A colorable contract for the purchase and sale of railway shares or of goods, where neither party intends to deliver or accept the shares or the goods, but merely to pay differences according to the rise or fall of the market, is gaming and wagering; and it is for a jury to determine whether the parties really meant to purchase and sell, or whether the transaction was a mere bet upon the future price of

(*f*) *Coombes v. Dibble*, L. R. 1 Ex. 248; 35 L. J. Ex. 167; 4 H. & C. 375.

(*g*) *Diggle v. Higgs*, 2 Ex. D. 422, C. A., overruling *Batty v. Marriott*, 5 C. B. 818; *Trimble v. Hill*, 5 Ap. Cas. 342.

(*h*) *Higginson v. Simpson*, 2 C. P. D. 76.

(*i*) *Beeston v. Beeston*, 1 Ex. D. 13.

(*k*) *Batty v. Marriott*, 5 C. B. 818. But see *Diggle v. Higgs*, *supra*.

(*l*) *Batson v. Newman*, 1 C. P. D. 571, C. A.

the commodity; (*m*) but there is no ground for contending that a contract for the sale of shares or of goods and chattels, to be delivered at a future day, is a gaming or wagering contract, merely because the vendor neither has the shares or goods in his possession, nor has entered into any contract to buy them, nor has any expectation of becoming possessed of them by the time appointed for transferring or delivering them, otherwise than by purchasing them in the market. (*n*) A bond given to persons to whom the obligor had lost bets on horse-races which he was unable to pay, in order to prevent them from taking the steps which under the conventional code established among betting men they were entitled to take, and which would have been followed by consequences involving the obligor in considerable pecuniary loss, is valid. (*o*) And where a broker was employed to speculate upon the Stock Exchange upon the terms that only the "differences" in prices were to be paid to the employer, it was held that the broker could sue for indemnity against the liabilities incurred by him in buying and selling on behalf of his principal and for his commission, (*p*) for although gaming and wagering contracts cannot be enforced, yet they are not illegal, so as to taint legal contracts entered into in furtherance of gaming.

Oral evidence may be given, and the parties themselves be * examined, to show that a contract purporting on the face of it to be a contract of sale was a mere gaming contract, void *ab initio*, although the contract is in writing or under seal. (*q*) The statute against gaming prevents the winner of a wager from recovering the money won by him from the loser, and also from recovering money deposited in the hands of a stakeholder to abide the event, and to be paid to the winner; (*r*) but it does not prevent the depositor from repudi-

(*m*) Grizewood v. Blane, 11 C. B. 538; Rourke v. Short, 25 L. J. Q. B. 196.

(*o*) Bubb v. Yelverton, L. R. 9 Eq. 471.

(*p*) Thacker v. Hardy, 4 Q. B. D. 685, C. A.

(*n*) Hibblewhite v. M'Morine, 5 M. & W. 466, overruling Bryan v. Lewis, R. & M. 386; Phillips, *Ex parte*, 6 Jur. n. s. 1273; 30 L. J. Bk. 1. As to the meaning of the word "time bargain," see Thacker v. Hardy, *infra*.

(*q*) Collins v. Blantern, 1 Smith's Lead. Cas. 310, 5th ed.; Enderby v. Gilpin, 5 Moore, 588.

(*r*) Beyer v. Adams, 26 L. J. Ch. 841.

ating the contract, and recovering back his deposit, before the event has happened, and the wager has been decided; nor does it prevent a third party from suing for the recovery of money paid at the request of the defendant to the winner of a bet. (s)

Lotteries.¹ — Various statutes have from time to time been passed for the suppression of lotteries, and contracts with respect to them have been declared to be illegal. (t)

Betting-House Keepers. — By the 16 & 17 Vict. c. 119, sect. 1, betting-houses are prohibited; and it is provided (sect. 5) that money or valuables received as a deposit on any bet may be recovered back, with full costs of suit. (u) But nothing contained in the act is to extend (sect. 6) to any person receiving or holding money or valuables by way of stakes or deposit to be paid to the winner of any lawful race, sport or game, or to the owner of any horse engaged in any race.

Lawful Games. — Playing at lawful games, such as horse-races, steeple-chases, and foot-races, or the game of dominos, does not

¹ The laws, and even the constitutions, of all but two or three of the States forbid lotteries, very generally declaring them nuisances; and render the various contracts incident to the prosecution of the business invalid. The most instructive decisions as to what constitutes a lottery within the doctrine, are *State v. Shorts*, 32 N. J. L. 398; *Governors of the Alms House v. American Art Union*, 7 N. Y. 228; *People v. American Art Union*, 13 Barb. 577; *Bennett v. American Art Union*, 5 Sandf. 614; *Thomas v. People*, 59 Ill. 160; *Commonwealth v. Thatcher*, 97 Mass. 583; *Marks v. State*, 45 Ala. 38; *Negley v. Devlin*, 12 Abb. Pr. n. s. 210; *State v. Clark*, 33 N. H. 329; *Dunn v. People*, 40 Ill. 465; *State v. Bryant*, 74 N. C. 207; *Bell v. State*, 5 Sneed, 507; *Wooden v. Shotwell*, 23 N. J. L. 465; 24 N. J. L. 789; *State v. Lovell*, 39 N. J. L. 458; *United States v. Olney*, 1 Abb. U. S. 275; *Holoman v. State*, 2 Tex. App. 610; *Wilkinson v. Gill*, 74 N. Y. 63; *Commonwealth v. Sheriff*, 10 Phila. 203; *Tuscaloosa Scientific, &c. Assoc. v. State*, 58 Ala. 54; *State v. Hindman*, 4 Mo. App. 582; *Rothrock v. Perkinson*, 61 Ind. 39; *Kohn v. Koehler*, 21 Hun, 466; *Boyd v. State*, 61 Ala. 177; *Buckalew v. State*, 62 Ala. 334; *State v. Yoke*, 9 Mo. App. 582. The general result of the decisions is, that the prohibition is not limited to "lotteries" so called, offering money prizes; but any scheme whatever for selling to the general public shares or chances in a distribution to be made by lot or hazard, is a lottery, no matter what it is named, and no matter whether money, merchandise, or even land is offered. See, further, U. S. Dig. tit. *Lotteries*.

(s) *Jessop v. Lutwyche*, 10 Exch. 614; 24 L. J. Ex. 65.

(t) 10 Will. III. c. 23; 9 Anne, c. 6, sect. 56; 42 Geo. III. c. 119; 12 Geo. II.

c. 28. As to what may be a lottery, see *Sykes v. Beadon*, 11 Ch. D. 170, 190.

(u) *Doggett v. Cattermoss*, 34 L. J. C. P. 159; 19 C. B. n. s. 765.

amount to gaming, unless bets are made, and money lost and won; but if the amount of a bet is deposited in the hands of a stakeholder, to be awarded to the winner of the bet, the money cannot be recovered by the winner; (x) for all bets, though made upon a lawful game, are invalidated by the statute. (y)

Notes, Bills, and Mortgages given to secure Money won at, or lent for, Play, are not absolutely void, but are deemed and taken to have been made for an illegal consideration only; so that they are void only as between the original parties (z) and those persons who take them without consideration, or with notice of the illegality of the consideration, or after they have become overdue. (a)

[* 1159] * **Money knowingly lent for Gaming,** or to be employed by the borrower in playing at cards, or dice, or any game of chance or skill in a common gaming-house, or in playing at the games of hazard, the ace of hearts, pharaoh, or basset, cannot be recovered from the borrower, as the lender is himself a party to the violation of the statutes prohibiting such games. But money lent to play at whist, or cribbage, or any game not prohibited by act of parliament, may be sued for and recovered from the borrower, provided the loan is not part and parcel of a wagering or gaming contract. (b) If, therefore, a licensed publican lends money to a guest to enable the latter to play at a game prohibited by law, or to lay bets or wagers on games of chance, the money so lent cannot be recovered. (c) But if a man who has lost money at play asks a friend to pay the money for him, the latter is entitled to recover the money from the party at whose request he advanced it, although he knew perfectly well at the time he advanced the money that it was lent to pay a gambling debt. (d) So if a party loses a wager

(x) *Varney v. Hickman*, 5 C. B. 271; 17 L. J. C. P. 102; *Moon v. Durden*, 2 Exch. 22.

(y) *Parsons v. Alexander*, 24 L. J. Q. B. 277; see *post*, p. * 1172; and *ante*, *Implied Contracts*, p. * 1045.

(z) *Cooke v. Stratford*, 13 M. & W. 379; 9 Anne, c. 14; 5 & 6 Wm. IV. c. 41; 8 & 9 Vict. c. 109, sect. 18.

(a) *Edmunds v. Groves*, 2 M. & W. 642; *Hay v. Ayling*, 16 Q. B. 431.

(b) *M'Kinnell v. Robinson*, 3 M. & W. 434.

(c) *Foot v. Baker*, 6 Sc. N. R. 309; 5 M. & Gr. 335.

(d) *Alcinbrook v. Hall*, 1 Wils. 309; *Knight v. Camber*, 15 C. B. 564; 24 L. J. C. P. 121; *Jessop v. Lutwyche*, 10 Exch. 614; 24 L. J. Ex. 65.

and requests another to pay it for him, he is liable to the party so paying it, for money paid at his request. (*e*)

Usury Laws.¹—The usury laws are repealed by the 17 & 18 Vict. c. 90. Bills of exchange given after the repeal of these laws, in renewal of bills given before that time to secure the repayment of money lent at usurious interest, are valid. (*f*)

Sale by Illegal Weights and Measures.—By the 41 & 42 Vict. c. 49, provision is made for the establishment of uniform weights and measures, and penalties are imposed for using unjust weights and measures; (*g*) and any contract made by any such weights or measures is declared void. (*h*) It is moreover enacted that all contracts for work to be done or for goods, merchandise, or other things to be sold, delivered, done, or agreed for, by weight or measure, where no special agreement shall be made to the contrary, shall be deemed to be made according to the standard weights and measures. The statute does not prevent contracts from being made by any multiple or aliquot part of the pound weight, or by metric system, or decimal subdivision. Where, therefore, a contract was made for the sale of iron by what is called "long weight," a well-known term used in the North to designate the long hundred of 120 lbs.

as distinguished from the Southern *hundred of 112 [* 1160] lbs., it was held that the contract was valid, as "the ton long weight" was a multiple of the standard pound. (*i*) And where, on a sale by hobbet, it appeared that the hobbet was a local term designating a given number of pounds' weight, it was held that this was a sale by the pound weight, the hobbet being a known multiple of a pound. (*k*) These statutes do not avoid contracts made in England for the sale of goods to be measured or weighed abroad. (*l*)

By the 33 Vict. c. 10, sect. 6, every contract, sale, payment,

¹ For the effect of usury upon a contract, see U. S. Dig. tit. *Usury*.

(*e*) *Rosewarne v. Billing*, 33 L. J. C. P. 55; 15 C. B. N. s. 316.

(*f*) *Flight v. Reed*, 1 H. & C. 703; 32 L. J. Ex. 265.

(*g*) Sects. 25, 19–24.

(*h*) Sect. 25.

(*i*) *Jones v. Giles*, 10 Exch. 119; 24 L. J. Ex. 259, s. c. in error.

(*k*) *Hughes v. Humphreys*, 3 Ell. & Bl. 958; 23 L. J. Q. B. 356.

(*l*) *Rosseter v. Cahlmann*, 8 Exch. 361; 22 L. J. Ex. 128.

bill, note, instrument, and security for money, and every transaction, dealing, matter, and thing whatever, relating to money or involving the payment of or the liability to pay any money, which is made, executed, or entered into, done or had, shall be made, executed, entered into, done, and had according to the coins which are current and legal tender in pursuance of that act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign state.

Illegal Sale of Coals.¹—By the 5 & 6 Wm. IV. c. 63, sect. 9, re-enacted by the 41 & 42 Vict. c. 49, Sch. Part II. (*m*), it is enacted that all coals, slack, culm, and cannel shall be sold by weight and not by measure; and a penalty is imposed on all persons who sell such articles by measure and not by weight. If any of the requirements of the statute were not complied with, the vendor was unable to sue for the price. (*n*) A weighing by putting the sacks of coals successively in one scale of the weighing-machine against weights equal to the weight each sack should contain and an empty sack in the other scale, was held not weighing according to the 54th section of the statute. (*o*) When the delivery is of a whole cargo of coals direct from the vendor's coal-brig to the purchaser's wharf without the intervention of lighters and barges, a ticket is not required. (*p*)

Illegal Sale of Game.—The 1 & 2 Wm. IV. c. 32, sects. 17, 25, 27, regulates the sale of game by gamekeepers and persons who have taken out game certificates, and imposes a penalty upon all persons who sell game without a license to deal in game, or

¹ The validity of sales questioned on the ground of any supposed violation of statute, depends on the statute laws of the several States. For a view of the subject from an English standpoint, see *Benj. Sales*, sects. 503–559. Most of the American cases may be found in *U. S. Dig. tit. Sales*, sects. 315, 337, 344; also *ib. tit. Contracts*, sect. 1383; and the various titles under which the prohibitive law involved is treated; also in *Ann. Dig. 1870–1878, tit. Sales*; *ib. 1879, &c., tit. Sale*.

(*m*) The act is repealed, but sect. 9 798; 16 L. J. Ex. 126. As to the recovery of penalties, see *Collins v. Hopwood*, 15 M. & W. 463; 16 L. J. Ex. 124.

(*n*) *Little v. Poole*, 9 B. & C. 200; *Cundell v. Dawson*, 17 L. J. C. P. 311; 4 C. B. 376; *Tyson v. Thomas, M'Clel. & Y.* 119. (*p*) *Blanford v. Morrison*, 15 Q. B. 724; 19 L. J. Q. B. 533.

(*o*) *Meredith v. Holman*, 16 M. & W.

* without having a game certificate, and upon all un- [* 1161]
licensed persons who buy game from unlicensed dealers.

Illegal Sale of Spirituous Liquors.—The 24 Geo. III. c. 40, sect. 12, enacts that no person shall be entitled to sue for the price of spirituous liquors unless the debt shall have been *bona fide* contracted for at one time to the amount of 20s. or upwards, nor shall any particular item or article in any account or demand for distilled spirituous liquors be allowed and maintained where liquors delivered at one time and mentioned in such article or item shall not amount to 20s. at the least. (g) But by the 25 & 26 Vict. c. 38, the 24 Geo. III. c. 40, so far as it relates to spirituous liquors sold to be consumed elsewhere than on the premises where sold, and delivered at the residence of the purchaser thereof in quantities not less at any one time than a reputed quart, is repealed. Spirits mixed with water are spirituous liquors within the meaning of the act. (r) If payments are made on account of a tavern bill containing items for spirits, together with other general items, and the tavern-keeper appropriates the payments in satisfaction and discharge of his claim for the spirits, his right of action for the rest of his demand is not affected by the statute. (s) By the 30 & 31 Vict. c. 142, sect. 4, no action is thenceforth to be brought or be maintainable in any court to recover any debt or sum of money alleged to be due in respect of the sale of any ale, porter, beer, cider, or perry which was consumed on the premises where sold or supplied, or in respect of any money or goods lent or supplied, or of any security given for, on, or towards the obtaining of any such ale, &c. The sale of spirits is also regulated by the 43 & 44 Vict. c. 24, see sects. 146–149.

Illegal Sale of Poison and Adulterated Food.—The sale of arsenic is regulated by the 14 & 15 Vict. c. 13, and that of other poisons by the 31 & 32 Vict. c. 121, and the 32 & 33 Vict. c. 117. (t) The selling of poisoned grain, meal, or seed is pro-

(g) *Burnyeat v. Hutchinson*, 5 B. & Exch. 281; 16 M. & W. 74; *Bailey v. Ald.* 241; *Hughes v. Done*, 1 Q. B. 302; *Harris*, 18 L. J. Q. B. 115; 13 Jur. 341. *Lansdale v. Clarke*, 1 Exch. 78. (s) *Philpott v. Jones*, 2 Ad. & E. 41;

(r) *Scott v. Gilmore*, 3 Taunt. 226. 4 N. & M. 14; *Owens v. Denton*, 1 See, further, as to what are spirits and C. M. & R. 712. (t) See *Berry v. Henderson*, L. R. 5

hibited by the 26 & 27 Vict. c. 113, and the sale of adulterated food and drugs by the 38 & 39 Vict. c. 63, (*tt*) amended by the 42 & 43 Vict. c. 30.

Illegal Sale of Explosive Substances.—The sale of explosive substances is regulated by the 38 & 39 Vict. c. 17; [* 1162] see also * 39 & 40 Vict. c. 36, and 42 & 43 Vict. c. 21. As to petroleum, see 34 & 35 Vict. c. 105; 42 & 43 Vict. c. 47; 44 & 45 Vict. c. 67.

Chain-Cables and Anchors.¹—By the 34 & 35 Vict. c. 101, sect. 7, it is made unlawful for any makers of, or dealer in, chain-cables or anchors to sell, or contract to sell, for the use of any vessel, any chain-cable whatever, or any anchor exceeding in weight 168 lbs., unless they have been tested and stamped in accordance with the provisions of that act, and the 27 & 28 Vict. c. 27. And see 37 & 38 Vict. c. 51, sects. 3, 4.

Smuggling.—If goods are sold abroad for the purpose of being smuggled into this country, and the vendor knowingly packs the goods in a particular way, to aid and assist the act of smuggling, or in any way shares or participates in the illegal transaction, he will not be permitted to sue upon the contract in any of our courts of justice. (*u*) If the vendor is merely cognizant of the intention of the purchaser to smuggle the goods, and confines himself simply to the act of selling, rendering no aid or assistance to the purchasers in the prosecution of the smuggling, our courts of law will not refuse to assist him to recover the price. (*x*) Although a foreigner is not bound to take notice of the revenue laws of this country, yet, if he makes himself a direct party to the act of breaking them, he cannot here recover the fruits of his illegal act. (*y*)

¹ On such subjects as are treated in this and the four preceding paragraphs, see p. * 1160, American note.

Q. B. 296; 39 L. J. M. C. 77; Pharmaceutical Soc. v. London & Prov. Supply Ass., 5 Ap. Ca. 857; Templeman v. Trafford, 8 Q. B. D. 397. (*u*) Parsons v. Birmingham Dairy Co., 9 Q. B. D. 172. (*x*) Biggs v. Lawrence, 3 T. R. 454; Clugas v. Penaluna, 4 ib. 466; Lightfoot v. Tenant, 1 B. & P. 556. (*x*) Holman v. Johnson, 1 Cowp. 341; Pellecat v. Angell, 2 C. M. & R. 311. (*y*) Waymell v. Reed, 5 T. R. 600.

Illegal Sale of Excisable Articles.—Many acts of parliament, passed for the mere purpose of raising a revenue, require persons dealing in certain classes of goods to take out a license or permit, and impose a penalty upon them in case of their neglect so to do. The omission to take out a license required for mere revenue purposes does not render contracts of sale entered into by such dealers in the way of their trade unlawful, unless such contracts are expressly forbidden, but only exposes them to the penalty or fine imposed by the statute. (z) But when the license is required for the protection of the public and the prevention of improper persons from acting in a particular capacity, and is not confined to revenue purposes, the imposition of the penalty amounts to a positive prohibition of the contract. (a) In order to legalize the sale of wines, beer, and spirituous liquors, two licenses are necessary, — one from the excise, the other from the magistrates in sessions. The license granted by the magistrates has no reference * whatever to revenue [* 1163] purposes ; it is required solely for the protection and preservation of public morals, and the prevention of crimes and offences which are subversive of good order and the public safety. Every person, therefore, who sells wines, spirits, &c., without being duly licensed so to do, has no remedy for the recovery of the price thereof. (b) A brewer who sells beer to be consumed in a public-house is not bound to ascertain whether the party who orders the beer is duly licensed before he supplies the article. (c) Mere knowledge, moreover, on the part of the vendor that the buyer will make an illegal use of goods sold to him is not sufficient to deprive the vendor of his right to payment of the price. It is necessary that the vendor should be a sharer in the illegal transaction, and should render some aid beyond that of merely selling the goods. (d)

(z) *Johnson v. Hudson*, 11 East, 180 ; (b) *Ritchie v. Smith*, 6 C. B. 474 ; 18
Smith v. Mawhood, 14 M. & W. 463 ; L. J. C. P. 9.
Brown v. Duncan, 10 B. & C. 23 ; 5 M. (c) *Brooker v. Wood*, 5 B. & Ad.
& R. 114 ; *Wetherell v. Jones*, 3 B. & 1052 ; 3 N. & M. 96.
Ad. 221. (d) *Hodgson v. Temple*, 5 Taunt.
(a) *Cope v. Rowlands*, 2 M. & W. 181 ; 1 Marsh. 5.
157.

Sunday Sales and Trading.¹ — By the 29 Car. II. c. 7, sect. 1, commonly called the Lord's Day Act, it is enacted that no

¹ It is believed that every State (except, perhaps, Louisiana) has a "Sunday law." Most of these laws are modelled upon the 29 Car. II. c. 7, sect. 1, mentioned in the text, except that any intent, such as some portions of the old English statute indicate, to enforce religious duties is either excluded from American enactments, or disavowed in the practical administration of them. Sunday is protected only as a rest-day desired and needed by the masses of the people; and contracts and business on that day are forbidden, simply because of their tendency to disturb the people at large in the enjoyment of their day of rest. *Commonwealth v. Has*, 122 Mass. 40; *Sparhawk v. Union Passenger Ry. Co.*, 54 Pa. St. 401, 432. In many of the States, the legislature would be debarred by constitutional provisions from enacting laws to compel a religious observance of any stated day (*Ex parte Newman*, 9 Cal. 502); but many decisions declare that the legislatures, generally, have power to secure the day from secular interruptions, provided they do not dictate as to how the time and leisure of various persons shall be employed. See U. S. Dig. tit. *Sabbath-Breaking*. The recent cases on this point are: *Ex parte Burk*, 8 Pac. C. L. J. 522, 24 Alb. L. J. 463; 3 Crim. L. Mag. 181; *Ex parte Koser*, 9 Pac. L. J. 163, 25 Alb. L. J. 283; *Usener v. State*, 8 Tex. App. 177; *Albrecht v. State*, ib. 313; *State v. Baltimore, &c. R. R. Co.*, 15 W. Va. 362. But compare *Ex parte Westerfield*, 55 Cal. 550.

For the decisions on the effect of the Sunday laws on contracts, business, labor, &c., see U. S. Dig. tit. *Sunday*; also ib. tit. *Contracts*, sect. 1328; Ann. Dig. 1870-1878, tit. *Contracts*, III. subd. "Sunday Contracts;" Ann. Dig. 1879, &c., tit. *Sunday*. See, further, articles on Sunday contracts, when void and when binding, by J. H. Lind, 17 Am. L. Reg. n. s. 281; on Legal effect of Sunday, 19 Am. L. Reg. n. s. 137, 209, 273; and on Sunday laws, what they mean, 13 West. Jur. 486.

Recent cases allow agricultural labor required in feeding livestock or saving crops, according to the course of good husbandry. *Edgerton v. State*, 67 Ind. 588; *Turner v. State*, ib. 595. Repairing railroad track may be done, if to do it in the week would gravely interfere with running important trains. *Yonoski v. State*, 13 Reporter, 655. Telegraph companies are not warranted in keeping offices generally open for business of all comers, though they may justify sending any single message by showing a particular necessity. *Rogers v. Western Union Tel. Co.*, 78 Ind. 169. Keeping cigar shops open is not "necessary," for customers can supply themselves on Saturday. *Mueller v. State*, 76 Ind. 310. Validity of an exchange of horses made on Sunday. *Winfield v. Dodge*, 45 Mich. 355; *Block v. McMurry*, 56 Miss. 217; *Gunderson v. Richardson*, 56 Iowa, 56; *Kinney v. McDermot*, 55 Iowa, 674. Offer to compromise a suit, inoperative to affect costs, if made on Sunday. *Merrill v. Robinson*, 35 Ark. 483. Whether a borrower or a maker of a note or other evidence of debt may repudiate the obligation to pay, on the ground that the loan was made or the instrument given on Sunday, and whether a *bona fide* holder of such instrument is liable to the defence equally with the original payee. *Ball v. Powers*, 62 Ga. 757; *Parker v. Pitts*, 73 Ind. 597; *Gilbert v. Vachon*, 69 Ind. 372; *Stevens v. Wood*, 127 Mass. 123; *Lamore v. Frisbie*, 42 Mich. 186; *Hellams v. Abercrombie*, 15 S. C. 110; *Mace v. Putnam*, 71 Me. 238; *Troewert v. Decker*, 51 Wis. 46. Price of goods sold and delivered on Sunday is not recoverable; but if delivery or final decision to buy was reserved till Monday, the bargain is valid. *Moseley v. Vanhooser*, 6 Lea, 286; *Rosenblatt v. Townsley*, 73 Mo. 536; and see *Van Hoven v. Irish*, 10 Fed. Reporter, 13; *Flinn v. St. John*, 51

tradesman, artificer, workman, or laborer shall exercise the worldly labor, business, or work of his ordinary calling upon the Lord's day (works of necessity and charity only excepted); and a penalty is imposed upon all persons of the age of fourteen years who offend against the statute. No action, consequently, can be brought for the price of goods sold on Sunday in the ordinary course of trade or business of the vendor, (e) unless the sale is within the exception of the act, which permits (sect. 3) food to be dressed or sold in inns, cook-shops, and victualling-houses, to persons who cannot be otherwise provided for, and milk to be carried about and sold at stated hours; or unless the sale is of bread, the baking and sale of which on Sundays are sanctioned under certain restrictions (5 & 6 Wm. IV. c. 37). (f) If the sale or other contract was not made in the exercise of the trade or ordinary calling of the party against whom it is sought to be enforced, it is not invalidated by the statute. (g) The sale of a horse, for example, by a person who is not a horse-dealer, is not within the statute; and if a sale is merely projected and proposed on a Sunday, and carried into effect on a subsequent week-day, it is not illegal. But if the contract of sale is con-

Vt. 334. Special contract made on Sunday is void in such sense as not to prevent recovery on a *quantum meruit* for a partial performance of services under it. *Thomas v. Hatch*, 53 Wis. 296. Agreement of partnership held void because made on Sunday. *Durant v. Rhener*, 26 Minn. 362. Bail-bond taken on Sunday valid. *Weldon v. Colquitt*, 62 Ga. 449. Whether subscriptions for religious and benevolent purposes or institutions are void if made on Sunday. *Catlett v. Trustees, &c.*, 62 Ind. 365; *Allen v. Duffie*, 43 Mich. 1. Subscribers to a petition for municipal aid to a railroad, who signed on Sunday, cannot be counted to make up the number of petitioners required by law. *De Forth v. Wisconsin, &c. R. R. Co.*, 52 Wis. 320. Railroad company is not excused, by intervention of Sunday, from its obligation to carry livestock promptly, but may be holden for any injury the animals sustain by delay (*Philadelphia, &c. R. R. Co. v. Lehman*, 56 Md. 209); and running passenger trains on Sunday is not a violation of a law simply forbidding unnecessary labor and business, for the exigencies of modern commerce have rendered some facilities for travel "necessary" (*Commonwealth v. Louisville, &c. R. R. Co.*, 3 Crim. L. Mag. 632); but running mere coal trains is unlawful in West Virginia (*State v. Baltimore, &c. R. R. Co.*, 15 W. Va. 362).

(e) *Fennell v. Ridler*, 5 B. & C. 406; *v. Cox*, 2 Burr. 787; *Rex v. Younger*, 5 8 D. & R. 204. T. R. 449.

(f) The baking provisions for customers is a work of necessity within the exception of the Lord's Day Act. *Rex* 131. (g) *Drury v. Defontaine*, 1 Taunt.

cluded on the Sunday, it will be void, although it may not be fulfilled by the delivery of the goods until a subsequent week-day. (*h*)

[* 1164] * If the goods are actually delivered to the purchaser under the void contract, the latter will have no right to detain them against the owner, unless it can be considered that both parties are *in pari delicto*. If the owner, subsequently to the void sale, demand on a week-day either the goods or the price, and the intended purchaser then promises to pay for them, a new and valid contract of purchase and sale arises between the parties, which may be enforced by action. But the law will not imply a promise to pay the price from the mere fact of the detention or use and consumption of the goods. (*i*) The hiring by a farmer of a laborer or servant is not an exercise of the farmer's ordinary calling, and, consequently, is not within the letter or spirit of the act. (*k*) Neither is a contract by a farmer for the covering of a mare with a stallion; (*l*) nor an agreement by a solicitor to become personally responsible for the payment of the debt of a client. (*m*) Farmers, attorneys, and surgeons, moreover, do not range under the classes of persons (tradesmen, artificers, workmen, and laborers) mentioned in the statute. A coach-proprietor or the driver of a hackney-coach is not a workman or laborer within the meaning of the statute; and a contract, therefore, for the hire of his coach or carriage, or a place therein, is not illegal, although made on a Sunday. (*n*)

Contracts for Prohibited Services.— Printers are required (32 & 33 Vict. c. 24) to affix their names and places of abode or business to all papers printed by them for reward; and if a printer neglects to comply with the requisitions of the statute, he cannot maintain an action for his labor or for the materials provided for the printing. (*o*) But as the name is required to

(*h*) *Bloxsome v. Williams*, 5 D. & R. 82; 3 B. & C. 233, 234; *Smith v. Sparrow*, 12 Moore, 266; 4 Bing. 84.

(*i*) *Williams' v. Paul*, 4 M. & P. 532; 6 Bing. 653; *Simpson v. Nicholls*, 3 M. & W. 240.

(*k*) *Rex v. Whitmash*, 7 B. & C. 602; 1 M. & R. 456; *Reg. v. Silvester*, 33 L. J. M. C. 79.

(*l*) *Scarfe v. Morgan*, 4 M. & W. 270.

(*m*) *Peate v. Dicken*, 1 C. M. & R. 422.

(*n*) *Sandiman v. Breach*, 7 B. & C. 96; 1 M. & R. 457, n.

(*o*) *Bensley v. Bignold*, 5 B. & Ald. 340; *Marchant v. Evans*, 2 Moore, 14.

be printed on the first or last leaf of every book, the omission might be rectified by the tender of the requisite printed leaf to the author or publisher at any time before actual publication. As soon as a printer discovers that he is printing libellous matter, he ought to stop, and may then recover for what he has done; but if he goes on with his printing, he makes himself a party to the unlawful transaction, and cannot recover his charges. (*p*)

Unauthorized Medical Practitioners.— By the Medical Act (21 & 22 Vict. c. 90, sect. 32) it is enacted that no person shall be entitled to recover any charge in any court of law for any medical * or surgical advice or attendance, or [* 1165] for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under that statute. This section is not confined to cases in which the patient is sued; and an unregistered practitioner cannot sue a registered practitioner for medicine supplied to, or attendance upon, the patients of the latter at his request. (*q*) But every person registered under the act may sue for his reasonable charges, unless he is a fellow or member of a college of physicians which has passed a by-law prohibiting their fellows and members from suing for their charges, (*r*) in which case the by-law may be pleaded (sect. 31) in bar to the action. This act, however, does not repeal section 21 of the Apothecaries Act (55 Geo. III. c. 194); and consequently a medical practitioner who is registered as a member of the College of Surgeons only, and who has no other qualification, cannot recover for attendance and medicine supplied in other than surgical cases. (*s*) Proof of the registration of the plaintiff at the time of the trial is insufficient; and it is necessary to show that he was registered at the time the services were rendered. (*t*) If a chemist attends patients, and applies and administers medicines, he practises as an

(*p*) *Clay v. Yates*, 1 H. & N. 73; 25 L. J. Ex. 237. As to the registration of printing-presses, see *Day v. Hemming*, 9 W. R. 703.
(*q*) *Alvarez de la Rosa v. Prieto*, 16 C. B. N. s. 578; 33 L. J. C. P. 262.
(*r*) *Gibbon v. Budd*, 2 H. & C. 92; 32 L. J. Ex. 182.
(*s*) *Leman v. Fletcher*, L. R. 8 Q. B. 319.
(*t*) *Leman v. Houseley*, L. R. 10 Q. B. 66.

apothecary, subjects himself to a penalty for so doing, and is disabled from suing for his charges. When an action has been brought to recover the amount of a chemist's bill, and it is contended that the items are properly within the scope of an apothecary's profession, the proper question to be submitted to the jury is, whether the plaintiff acted as a chemist or as an apothecary, and not whether he has charged as a chemist or as an apothecary. (*u*)

Unlicensed Brokers. — By the 6 Anne, c. 16, sect. 4, and the 57 Geo. III. c. 60, sect. 2, any person who shall take upon him to act as broker, or employ any other under him to act as such, within the city of London and liberties, not being admitted by the court of mayor and aldermen, is liable to be fined. This has been taken to imply a prohibition of all unadmitted persons to act as brokers, and, consequently, to prohibit, by necessary inference, all contracts which such persons make for compensation to themselves for so acting. A broker, consequently, cannot sue for commission and charges in respect of work done or services

rendered in the city of London, unless he has been [* 1166] duly licensed. (*x*) But the want * of a license does not

prevent the broker from maintaining an action for the recovery of money paid out of his own pocket for shares purchased by him by order of his principal. (*y*) By the 30 Vict. c. 23, sect. 16, it is made unlawful for any broker, agent, or other person negotiating or transacting or making any sea insurances, to charge his employer any sum for his services, or for any money paid by way of premium, unless the policy is written on vellum, parchment, or paper, duly stamped; and every sum paid by such employer contrary to that act is to be deemed to have been paid without consideration, and is to remain the property of such employer, his executors, administrators, or assigns.

Uncertificated Solicitors. — By the 6 & 7 Vict. c. 73, it is enacted (sect. 26), that no person who as an attorney or solicitor

(*u*) *Richmond v. Coles*, 8 Dowl. n. s. 560.

(*x*) *Cope v. Rowlands*, 2 M. & W. 159. The jurisdiction of the Court of Aldermen over brokers has almost ceased since the 33 & 34 Vict. c. 60.

(*y*) *Pidgeon v. Burslem*, 3 Exch. 470; 18 L. J. Ex. 193; *Smith v. Lindo*, 5 C. B. n. s. 587; 27 L. J. C. P. 196; *Jessopp v. Latwyche*, 10 Exch. 614.

shall prosecute, defend, or carry on any proceeding in any court without having previously obtained a stamped certificate which shall then be in force, shall be capable of maintaining any action or suit for the recovery of any fee, or reward, or disbursement in respect of any business done by him as an attorney or solicitor whilst he shall have been without such certificate. (z) But the debt is still subsisting, although he can take no steps to enforce its payment; (a) and though uncertificated and unable to sue for his fees, he may do acts in his capacity of solicitor which will be valid, and will bind his client. (b) By the 37 & 38 Vict. c. 68, sect. 12, no costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act, shall be recoverable in any action, suit, or matter, by any person or persons whomsoever. (c)

Contracts by Waywardens. — By the 26 & 27 Vict. c. 61, sect. 1, no waywarden may, directly or indirectly, in his own name or in the name of any other person, contract for the repair of any road, or for any other work to be executed under the provisions of the 25 & 26 Vict. c. 61, within the parish for which he is elected waywarden, or within any other parish in the same district; and by sect. 2, it is made unlawful for any highway board to pay knowingly for any repair or work so contracted for; and any money paid by any board under any such contract may be recovered by them from the person to whom the same shall have been paid. * But by the 27 & 28 Vict. [* 1167] c. 101, sect. 20, any waywarden may contract for the supply or cartage of materials within the parish for which he is waywarden, with the license of two justices assembled at petty sessions, to be granted on such application as is therein provided.

Illegality of Contracts for the Payment of Work otherwise than in Current Coin — The Truck System. — By the 1 & 2 Will. IV. c. 37, it is enacted (sects. 1, 19) that in all contracts for the hiring of any artificer in the iron or steel manufactures,

(z) *Duke of Brunswick v. Crowl*, 4 Exch. 492.

(a) *In re Jones*, L. R. 9 Eq. 63; 39 L. J. Ch. 83; *Fullalove v. Parker*, 31 L. J. C. P. 239, 240.

(b) *Holdgate v. Slight*, 21 L. J. Q. B. 75; *Sparling v. Breerton*, L. R. 2 Eq. 64; 35 L. J. Ch. 461.

(c) See *In re Fowler v. Monmouthshire Canal Co.*, 4 Q. B. D. 334.

or in the working of mines of coal, iron, limestone, or salt-rock, or the getting of stone, slate, or clay, or in the preparing of salt, bricks, tiles, or quarries, or in the manufacturing of nails, chains, rivets, &c., spades, shovels, &c., or any articles of hardwares of iron or steel, or plated articles of cutlery, or goods or wares made of brass, tin, or other metal, or of any japanned goods or wares, or in the spinning, throwing, twisting, &c., weaving, combing, knitting, bleaching, dyeing, printing, or otherwise preparing of any kinds of woollen or worsted yarn, stuff, &c., cloth, serge, cotton, leather, fur, hemp, flax, mohair, or silk manufactures whatsoever, or in the glass, porcelain, china, or earthenware manufacture, or in the making or preparing of bone, thread, silk, or cotton lace, &c., the wages of such artificer shall be made payable in the current coin of the realm only; and that if in any such contract the whole or any part of such wages shall be made payable in any other manner, such contract shall be illegal, null, and void. (d) Also (sect. 2) that if in any contract between any artificer in any of the trades enumerated and his employer, any provision shall be made "respecting the place where, or the manner in which, or the person with whom, the whole or any part of the wages" of such artificer shall be expended, such contract shall be illegal and void. All such artificers are empowered (sect. 4) to sue for and recover any wages that have not been paid them in the current coin of the realm. Payment may, however, be made (sect. 8) in bank notes, if such artificer consent thereto. If a person is not hired to do the work himself, the fact of his being employed and contracting to get it done does not make him an artificer within the meaning of the act. The persons intended to be protected by the legislature are those who are hired to labor with their hands for daily wages. (e) A framework-knitter is an artificer within the meaning of the act. (f)

(d) *Ashersmith v. Drury*, 28 L. J. 371; *Ingram v. Barnes*, 7 Ell. & Bl. M. C. 5; 1 Ell. & Bl. 46. 115, 132; 26 L. J. Q. B. 82; *Sleeman*

(e) *Riley v. Warden*, 2 Exch. 59; *v. Barrett*, 33 L. J. Ex. 153; 2 H. & C. *Sharman v. Sanders*, 22 L. J. C. P. 86; 934.

13 C. B. 166; *Weaver v. Floyd*, 21 L. J. Q. B. 151; 16 Jur. 289; *Bowers v. Lovekin*, 6 Ell. & Bl. 584; 25 L. J. Q. B. 355. (f) *Moorhouse v. Lee*, 4 F. & F.

* The object of this statute is to give the workman [* 1168] full remuneration for his labor, and no more; and, therefore, deductions of sums which never belonged to the workman as part of his wages do not invalidate the contract. Thus when the plaintiff, a framework-knitter, agreed with the defendant, an undertaker or middleman, to make gloves at a certain agreed price per dozen, subject to a deduction of 1s. 6d. a week for the use of the frames furnished by such middleman, and 1s. 6d. a week as a remuneration for the use of a workshop, and for his trouble in procuring and conveying to the plaintiff materials for his work and returning them safe to the master manufacturer, also 7d. per week for winding the yarn, and a penny in the shilling on the amount of the plaintiff's weekly earnings above 14s. in the week net for repairs of certain machinery, all which deductions were fair and reasonable, and in accordance with the custom and usage of the trade, it was held that the contract was not invalidated by the statute. (g) Payment in damaged cloth was held not payment in coin. (h) If the employer set up a shop, and make use of any compulsion to induce his workmen to lay out their wages at this shop, the wages thus received and compulsorily expended at the employer's shop are not, it seems, valid payment of wages, but are within the mischief intended to be provided against by the Truck Acts. (i)

By the 1 & 2 Will. IV. c. 37, sect. 23, the employer may contract to supply the artificer with medicine, medical attendance, and materials to be employed in his occupation if a miner, and may demise to the artificer a tenement at any rent reserved, and may contract to make stoppages or deductions from the wages in respect of rent, medical attendance, &c., provided the contract for such stoppages is in writing (k) and signed by the artificer. The amount to be deducted in respect of each head of deduction need not be specified in the contract. (l) The employer may deduct 6d. a week for medicine, to be paid by the

(g) *Chawner v. Cummings*, 8 Q. B. 325; 15 L. J. Q. B. 161. But see now the Hosiery Act, 1874, 37 & 38 Vict. c. 48, sects. 1-5, by which these deductions and stoppages are made illegal.

(h) *Smith v. Walton*, 3 C. P. D. 109.

(i) *Olding v. Smith*, 16 Jur. 497.

(k) *Pillar v. Llynvi Coal Co.*, L. R. 4 C. P. 752.

(l) *Cutts v. Ward*, L. R. 2 Q. B. 357; 36 L. J. Q. B. 161.

miner toward a club kept by the employer for the purpose of providing medicine and medical attendance for such miners as may require them; (m) but in order to be valid, the contract for the supply of materials must be an absolute contract of sale, and not a mere contract of hiring by the artificer. (n) Deductions or stoppages in the hosiery trade in respect of frame-rent, * machine-rent, standing of frames and machines, winding the material, fines for irregular attendance, gas for lighting the factory, and fire in waiting-room, amounting to about 3s. 9d. per week and being fixed charges, have been held not to be illegal. (o)

Divisible Contracts, Part being good and Part bad.¹ — If there are several considerations for separate and distinct contracts, and

¹ The general doctrine is, that if the promise and the consideration are each entire, and the consideration is, even in part, illegal, the contract is void. *Pettit v. Pettit*, 32 Ala. 288; *Collins v. Merrell*, 2 Met. (Ky.) 163; *Deering v. Chapman*, 22 Me. 488; *De Beerski v. Paige*, 36 N. Y. 537; *Barton v. Port Jackson, &c. Plank Road Co.*, 17 Barb. 397; *Doty v. Knox County Bank*, 16 Ohio St. 133; *Filson v. Himes*, 5 Pa. St. 452; *Thompson v. Collins*, 2 Head, 441; *Woodruff v. Hinman*, 11 Vt. 592; *Frazier v. Thompson*, 2 Watts & S. 235; *Buck v. Albee*, 26 Vt. 184. But where a contract consists of two or more distinct parts, which are readily severable, and not in any material sense dependent on each other, one part being valid and the other void, the rule is to enforce that part of the contract which is valid. *Treadwell v. Davis*, 34 Cal. 601; *Gelpcke v. Dubuque*, 1 Wall. 221; *Hynds v. Hays*, 25 Ind. 31; *Frazier v. Thompson*, 2 Watts & S. 235.

Thus if the consideration is severable into two parts, one of which is lawful, and adequate by itself to support the promise, the contract may be sustained, notwithstanding illegality in the part of the consideration which is rejected; or one good promise to pay may be sufficient, though there be others which are worthless, if these latter are independent of the good one. *Rich v. Dupree*, 14 Ga. 661.

In like manner, a lawful promise is not necessarily impaired by being joined in a contract with an unlawful one, provided the two can be separated; in other words, a person who upon good and valid consideration promises to do two things, one legal and the other illegal, will be bound to the performance of the former, unless the two are so intermingled that they cannot be separated, in which case the whole contract is void. *Casady v. Woodbury County*, 13 Iowa, 113.

But where part of a contract is illegal, the courts will not, under color of enforcing the part which is good, sanction the whole. *Bank of Newberry v. Stegall*, 41 Miss. 142.

Where a holder of corporate shares surrendered his certificate to the transfer officer, on the latter's promise to issue in lieu thereof two certificates, one for a portion of the shares to be used in corrupting certain public officers in the interest

(m) *Cutts v. Ward*, *supra*.

(n) *Cutts v. Ward*, *supra*.

(o) *Archer v. James*, 2 B. & S. 61;

31 L. J. Q. B. 153. But see note (g), *supra*.

one is good and the other bad, the one may stand and be enforced, although the other fails. The invalidity of the one will not necessarily induce the destruction of the other. (*p*) If a deed of conveyance contains limitations and grants of land and tenements to uses, some of which are charitable uses within the 9 Geo. II. c. 36, the deed will be void so far as it relates to the charitable uses, but valid so far as it passes the other lands to the other uses. (*q*) If a settlement contains provisions for the case of a future separation between the husband and wife, those provisions are void; but the rest of the settlement may be valid. (*r*) Where a rector granted a yearly rent-charge, payable out of his benefice, and covenanted to pay the rent-charge, and the grant was avoided by the 13 Eliz. c. 30, it was held that the rector was nevertheless liable upon his covenant to pay annually to the plaintiff the amount intended to have been charged upon the benefice. (*s*) And where a bill of sale of a ship, made by way of mortgage, was void for not reciting the certificate of registry therein, it was held that the mortgagor was liable, upon his personal covenant contained in the same deed, for the repayment of the money advanced on the intended security of the vessel. (*ss*) A covenant to pay rent and taxes has been held not to be avoided by including property tax. (*t*) Where a corporation had by a deed which was *ultra vires* borrowed money for a purpose to which the borough fund was inapplicable, though the substance of the deed was held bad, yet the covenant for repayment

of the company, and the other for the residue of the stock which was to be returned to the holder, — *held*, that as the consideration for this promise (*viz.*, the delivery of the original certificate) was in part for an illegal purpose (*viz.*, providing a corruption fund), the promise could not be enforced, and the stockholder had no right of action for so much of the stock as by the arrangement was to be returned to him. Nothing is better settled in the law of contracts than that if any part of the consideration upon which a promise rests is illegal, the entire promise fails; but the converse of this is not always true. *Tobey v. Robinson*, 99 Ill. 222, 233.

Debtor's conveyance on secret trust, not sustained, as against creditors, by partial money consideration. *Moore v. Wood*, 100 Ill. 451.

(*p*) *Collins v. Blantern*, 2 Wils. 341; 509; *Hamilton v. Hector*, L. R. 13 Eq. Bishop of Chester *v. Freeland*, Ley, 79; 511.

1 Vin. Abr. 332.

(*s*) *Mouys v. Leake*, cited *Kerrison*

(*q*) *Doe v. Pitcher*, 6 Taunt. 369; *v. Cole*, 8 East, 231.

(*ss*) *Kerrison v. Cole*, *supra*.

Howe v. Syngé, 15 East, 440.

(*r*) *Merryweather v. Jones*, 4 Giff.

(*t*) *Gaskell v. King*, 11 East, 165.

of the money was held to be good, and capable of being enforced. (u) Where, on a contract for the sale of a perfumer's business, the vendor covenanted not to carry on the trade of a perfumer within the cities of London and Westminster, or within the distance of six hundred miles from the same, it was held that the covenant was good so far as it related to the cities of London and Westminster, though it was void as to the six hundred miles. (x) So where a bill of exchange was accepted [* 1170] to secure * payment of a sum of money, consisting partly of a debt from which the acceptor had been discharged under the Insolvent Debtor's Act, and partly of a new debt, it was held that the bill was a valid security as to the latter, although it was void as regarded the former debt. (y) And where there are separate and independent covenants in the same deed, the illegality of one of the covenants does not invalidate the others. (z) These cases come within the rule laid down by Hutton, J., that "when a good thing and a void thing are put together in one self-same grant, the law shall make such a construction that the grant shall be good for that which is good, and void for that which is void," and also within the maxim, *Utile per inutile non vitiatur*. Where there are two considerations, the one good and the other bad, and general damages have been recovered, they will be deemed to have been given in respect of the good consideration alone. (a)

Indivisible Contracts.¹ — If there is one entire consideration for two several contracts, and one of these contracts is for the performance of an illegal act, the whole is void. Thus where one sum is to be paid for the doing of a legal and an illegal act, the whole contract is void. (b) And if a contract or promise be founded upon a legal and an illegal consideration, and the illegal consideration cannot be separated from the legal consid-

¹ See p. * 1169, American note.

(u) *Payne v. Mayor, &c. of Brecon*, 3 H. & N. 572; 27 L. J. Ex. 495.

(x) *Price v. Green*, 16 M. & W. 346; 16 L. J. Ex. 108. "London" means the city of London, and not the metropolis generally. *Mallan v. May*, 13 M. & W. 517.

(y) *Sheerman v. Thompson*, 11 Ad. & E. 1027.

(z) *Wigg v. Shuttleworth*, 13 East, 87.

(a) *Ley*, 79; *Best v. Jolly*, 1 Sid. 38.

(b) *Hopkins v. Prescott*, 16 L. J. C. P. 263; 4 C. B. 578.

eration and rejected, the illegality of part vitiates the whole. (c) Where a bill of exchange was given to secure payment of a debt, part of which consisted of money lawfully advanced, and the rest of money due upon an illegal sale, it was held that the good part of the consideration for the bill could not be separated from the rest, and that the whole was illegal and void. (d) Every secret bargain in fraud of creditors is void when it is made, and cannot be enforced even against a fraudulent party; and when a part is fraudulent, the bargain, being entire, is altogether fraudulent and void. The creditor, therefore, can enforce no part of it; and it is no matter that part of the agreement is by deed and part by parol. (e) If upon a contract for the hiring and service of a housekeeper at certain agreed wages, it appears to have been part of the contract that the housekeeper should cohabit with her master, the whole will be void, and the wages irrecoverable. (f) * Where a verbal agreement was made [* 1171] to pay the debt of a third party (which is void, as we have before seen, by the statute of frauds, unless it is authenticated by writing), and to pay certain expenses connected therewith, it was held that the agreement was indivisible, and the whole invalid. (g) Upon a contract for the sale of tobacco, it was agreed that counterfeit money should be taken in payment, and the tobacco having been delivered and the counterfeit money sent, the vendor refused to receive it, and brought an action for the price of the tobacco; but, *per* Buller, J., "It cannot be said that the sale is good and that the payment is bad; if it be an illegal contract, it is equally bad for the whole. . . . The parties are *in pari delicto*, and *potior est conditio defendentis*." (h)

Void Foreign Contracts.¹ — As a general rule, a contract will not be enforced, unless it is valid by the law both of the country

¹ A contract prohibited and void by the law of the State where it was made, will not be enforced in another jurisdiction. *Kennedy v. Cochrane*, 65 Me. 594;

(c) *Featherstone v. Hutchinson*, Cro. Eliz. 199.

(d) *Scott v. Gillmore*, 3 Taunt. 226; *Thomas v. Williams*, 10 B. & C. 671; *Fergusson v. Norman*, 6 Sc. 810; *Willyams v. Bullmore*, 32 Beav. 574; 33 L. J. Ch. 461.

(e) *Higgins v. Pitt*, 4 Exch. 324.

(f) *Rex v. Northwingfield*, 1 B. &

Ad. 912.

(g) *Lexington v. Clarke*, 2 Ventr.

223; *Chater v. Beckett*, 7 T. R. 201.

(h) *Alexander v. Owen*, 1 T. R. 227.

in which it was made and of that in which it is sought to be enforced. (i)

Effect of Avoidance. — A person who has authorized the application of his money to an illegal purpose may revoke the authority and recover back the money at any time before it has been paid over; (k) and so long as an illegal contract remains executory and unperformed, money deposited by one of the parties in furtherance of the fulfilment of the contract, may be recovered back; (l) but not when the parties have carried out their unlaw-

Ford v. Buckeye Ins. Co., 6 Bush, 133; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173.

Executory contracts of sale of intoxicating liquors, to be completed elsewhere, held not in violation of law in Massachusetts. *Abberger v. Marrin*, 102 Mass. 70; *Ely v. Webster*, ib. 304; *Brockway v. Maloney*, ib. 308; see also *Dolan v. Green*, 110 Mass. 322. Compare *Rindskopf v. Deruyter*, 39 Mich. 1.

Where a mortgage is executed on land in one State for money loaned in another, but provides that the money shall be paid at the mortgagee's residence in that other State, with a rate of interest that would be void in the State of the mortgagee but not in that of the mortgagor, the plaintiff may elect to proceed under the laws of the State where the mortgage stands recorded, and where the whole contract is valid. *Fitch v. Remer*, 1 Flipper, 15.

A chattel mortgage executed and recorded according to the laws of the State where the property was at the time, and valid there, will be enforced in a State into which the property is afterward brought, unless some statute there forbids. *Ames Iron Works v. Warren*, 76 Ind. 512.

In an action against an attaching officer for the conversion of personal property attached as that of the seller under a contract of sale which, although written in Massachusetts, was executed, delivered, and recorded in another State where the property was at the time, the rights of the seller are to be settled by the law of such other State. *Ames v. McCamber*, 124 Mass. 85.

The general rule, that the validity and effect of a contract are to be determined by the law of the place where it is made, is subject to some exceptions. 1. No nation is bound to recognize or enforce contracts injurious to its own citizens. 2. The enforcement by one nation of contracts made under the laws of another, rests on a principle of comity, which cannot be so far extended as to violate the positive legislation of the nation called on to enforce such contracts. 3. When a contract which violates the revenue laws of the country where it was made, comes before the courts of another country, those courts will not take notice of the foreign revenue laws. *Ivey v. Lalland*, 42 Miss. 444.

Courts will not regard the revenue laws of a foreign State as affecting a contract sought to be enforced by parties within their jurisdiction. *Kohn v. Renaissance*, 5 La. Ann. 25; *Armendiaz v. Serna*, 40 Tex. 291. See *Ivey v. Lalland*, 42 Miss. 444.

(i) *Hope v. Hope*, 8 D. M. & G. 731. (l) *Walker v. Chapman*, cited 2 Doug. 471 a.

(k) *Bone v. Ekless*, 29 L. J. Ex. 438.

ful intention, and the illegal act has been accomplished, and both are *in pari delicto*. (m)

Money lost at play, (n) or paid for the purpose of procuring a pardon, (o) or for insurance in the nature of a wager, (p) or for supplying wine, &c., for a debauch at a brothel, (q) or for compounding a felony, or purchasing false evidence, or inducing a party not to appear and give evidence at a trial, or indemnifying bail with a like object, (r) cannot be recovered from the person to whom it has been paid. (s) If indentures of apprenticeship are void by reason of the amount of the premium paid with the apprentice not being truly or correctly stated pursuant to the requirements of the Stamp Acts, the money actually given with the apprentice cannot be recovered back on the ground of a * failure of consideration, as both parties are *in* [*1172] *pari delicto*. (t) When, however, the parties are not *in pari delicto*, the more innocent of the two may obtain the assistance of the law for the recovery of money paid by him to the other under the illegal contract, although the unlawful act may have been fully accomplished. And it has been held that a debtor paying money to one creditor as the price of procuring a fraud on his other creditors before the creditors enter into a composition, can recover back the money, the parties not being *in pari delicto*. (u) "If the contract," observes Domat, "is unlawful only on the part of him who receives, and not on the part of him who gives, he who has given money under the contract may recover it back, although the contract has been fulfilled by the receiver of such money. But if the contract is unlawful both on the one side and on the other, as if one party gives money to a judge to gain his cause, or one person gives money to another to induce him to commit a crime, he who has thus

(m) *Palyart v. Leckie*, 6 M. & S. 293; *Wilson v. Ray*, 10 Ad. & E. 88.

(n) *Thistlewood v. Cracroft*, 1 M. & S. 500; *Webb v. Bishop*, Bull. N. P. 132.

(o) *Norman v. Cole*, 2 Esp. 253.

(p) *Edgar v. Fowler*, 3 East, 225.

(q) *Taylor v. Chester*, L. R. 4 Q. B. 309; 38 L. J. Q. B. 225.

(r) *Wilson v. Strugnell*, 7 Q. B. D. 548.

(s) "Si dantis et accipientis turpis causa sit, possessorem potiore esse." — *Dig. lib. 12, tit. 5, lex 8.*

(t) *Stokes v. Twitchen*, 2 Moore, 538.

(u) *Atkinson v. Denby*, 30 L. J. Ex. 361; 31 ib. 362; 7 H. & N. 934; *In re Lenzberg's Policy*, 7 Ch. D. 650.

given his money is justly deprived of what he has expended, and cannot recover it back." (x)

Money in the Hands of Depositaries and Stakeholders.—The 8 & 9 Vict. c. 109, sect. 18, which enacts (*ante*, p. * 1156) that no action shall be brought for recovering any money or valuable thing deposited in the hands of any person to abide the event on which any wager shall have been made, was intended to prevent the recovery of the stake by the party who assumed to have won the wager, and not to prevent either of the parties depositing the money with a stakeholder from withdrawing his assent to the contract before the determination of the wager, and thus of his own free will preventing the result which the act was passed compulsorily to prevent. (y) So long as the money has not been actually paid over by the stakeholder or depositary to the winner, it may be recovered back by the depositor, (z) but not afterwards, (a) unless previous notice has been given not to pay over the money. (b)

[* 1173]

* SECTION II.

VOIDABLE CONTRACTS.¹⁰⁸

Of the Avoidance of Contracts on the Ground of Fraud and Unfair Dealing.¹—If one man obtain another's money by reason

¹ Regarding the avoidance of contracts on the ground of fraud, generally, see Bigelow, *Fraud* (1877); Kerr on *Fraud, &c.*; also 1 Whart, *Contr. c. 12*; 1 Story, *Contr. sect. 620*; 2 Pars. *Contr. c. 3, sect. 12, p. 767*; 6 Wait, *Act. & D. 813*; U. S. Dig. tit. *Fraud, IV.*; ib. tit. *Contracts, sect. 1310*.

Effect of fraud between buyer and seller of goods, on the contract of sale, see U. S. Dig. tit. *Sales, sects. 280, 303*; *Thurston v. Blanchard*, 22 Pick. 18, 33 Am.

(x) *Les Lois Civ. liv. 1, tit. 18, sect. 14, 5.* erick, 2 M. & W. 369; *Hampden v. Walsh*, 1 Q. B. D. 189; *Diggie v. Higgs*,

(y) *Varney v. Hickman, ante, p. 2 Ex. D. 422*; *Trimble v. Hill*, 5 Ap. * 1158; *Martin v. Hewson*, 24 L. J. Ex. Cas. 342.

174. (a) *Howson v. Hancock*, 8 T. R. 575.

(z) *Cotton v. Thurland*, 5 T. R. 405; (b) *Hastelow v. Jackson*, 8 B. & C. 221; *Bone v. Ekless*, 5 H. & N. 925; 29 *Farmer v. Russell*, 1 B. & P. 296; *Ten-* L. J. Ex. 438.
ant v. Elliot, ib. 3; *Marryat v. Brod-*

of a promise to do some particular thing, and refuses to do it, but keeps the money, it is a fraud; and it is at the election of

Dec. and extended note, *ib.* 702; *Cary v. Hotailing*, 1 Hill (N. Y.), 311, 37 Am. Dec. 323, and note, *ib.* 327; article on Defrauded Vendors of Chattels, 14 Cent. L. J. 442; *Burrill v. Stevens*, 73 Me. 395.

It is said that the law never presumes fraud (2 Pars. Contr. sect. 784); neither in law nor equity will it be presumed without proof (see cases cited 5 U. S. Dig. 501, sect. 419); and it is not to be lightly presumed after a denial on oath, nor to be inferred upon slight evidence, but must be distinctly and fully made out (*Hollister v. Loud*, 2 Mich. 309; *s. p.* *Colquitt v. Thomas*, 8 Ga. 258; *Gardner v. Garrish*, 23 Me. 46; *Hamilton v. Beall*, 2 Har. & J. 414; *Baldwin v. Buckland*, 11 Mich. 389; *Parkhurst v. McGraw*, 24 Miss. 134; *Jones v. Emery*, 40 N. H. 348. See also *Forsyth v. Matthews*, 14 Pa. St. 100). As every man is presumed to conduct honestly (*Hatch v. Bayley*, 12 Cush. 27), the fraudulent intent in any case must be shown (see 6 U. S. Dig. 745, sect. 1380); but as this is seldom susceptible of direct proof, it may be established by a consideration of all the circumstances of the case (*Blackman v. Wheaton*, 13 Minn. 326; *Hicks v. Stone*, *ib.* 434; *Weisiger v. Chisholm*, 28 Tex. 780; *Graham v. Roder*, 5 Tex. 141); as from the circumstances and condition of parties contracting (*Kendall v. Hughes*, 7 B. Mon. 368; *Pope v. Andrews*, 1 Smed. & M. Ch. 135; *White v. Trotter*, 22 Miss. 30; *King v. Moon*, 42 Mo. 551; *Gallatin v. Cunningham*, 8 Cow. 361; *Booth v. Bunce*, 33 N. Y. 139; *Briscoe v. Bronaugh*, 1 Tex. 326; *Burch v. Smith*, 15 Tex. 219); and the circumstances must be so strong and pregnant that no other reasonable conclusion can be drawn from them (*Paxton v. Boyce*, 1 Tex. 317). Among such circumstances, the mental, physical, and pecuniary condition of the parties to a contract may be taken into consideration. *King v. Cohorn*, 6 Yerg. 75. Fraud is often a conclusion of law which courts will infer from acts and circumstances, whether the existence of a fraudulent purpose, in the strict sense, be proved or not (*Story v. Norwich, &c. R. R. Co.*, 24 Conn. 94); and it appears that strong presumptive circumstances of fraud will outweigh positive testimony against it (*The Short Staple*, 1 Gall. 104; *Gayoso v. Delaroderie*, 9 La. Ann. 278). Courts of equity, however, will presume fraud from circumstances not sufficient to prove the fraud at law. *Denton v. M'Kenzie*, 1 Desau. 289.

The burden of establishing fraud is upon the party making the charge. *Jordan v. Dobson*, 2 Abb. U. S. 398; *Thompson v. Wharton*, 7 Bush, 563. The facts must be averred and proved affirmatively (*Klein v. Horine*, 47 Ill. 430; *Beatty v. Fishel*, 100 Mass. 448); as where the plaintiff alleges that he has sustained damage by reason of false representations in a contract (*Grimmell v. Warner*, 21 Iowa, 11; *Strong v. Place*, 4 Robt. (N. Y.) 385); but in an issue upon an interpleader, it was held that the burden of showing good faith and a valuable consideration was on the buyer (*Redfield, &c. Co. v. Dysart*, 62 Pa. St. 62); so the burden is upon a party holding a confidential or fiduciary relation to establish the perfect fairness, adequacy, and equity of a transaction with the party with whom he holds such relation; and that, too, by proof entirely independent of the instrument under which he may claim (*Cumberland Coal, &c. Co. v. Parish*, 42 Md. 598; *Street v. Goss*, 62 Mo. 226). The burden is on the seller to prove the fraud where he brings a bill to set aside a sale of shares in a corporation on the ground of fraudulent practices in an examination of the corporate affairs (*Hager v. Thomson*, 1 Black. 80); upon creditors attempting to deprive a wife of her estate (*Ewing v. Gray*, 12 Ind. 64); upon the defendant who undertakes to impeach the consideration of a bond (*Ran-kin v. Badgett*, 5 Ark. 345; *s. p.* *Rogers v. Worth*, 4 Blackf. 186; *Blaisdell v.*

the party injured either to affirm the contract by bringing an action for the non-performance of it, or to disaffirm it, *ab initio*, by reason of the fraud, and bring an action for the money. (a) If a person obtains goods under a contract of sale with the fraudulent intention of never paying for them, the contract is voidable as far as the vendor is concerned, and the goods may be recovered by the latter, (b) provided he makes his election before the goods have been resold and transferred to a *bona fide* purchaser; (c) but if the vendor does not think fit to avail himself of the fraud, he may treat the contract as a subsisting contract, and sue for

Cowell, 14 Me. 370; Duvall v. Coale, 1 Md. Ch. 168); upon the party seeking to avoid a contract (Oaks v. Harrison, 24 Iowa, 179); upon the party who seeks to impeach a vendee's title to property (Salmon v. Orser, 5 Duer, 511); but if goods have been obtained from their owner by fraud and false pretences, the burden of proof is upon one who claims under a subsequent purchase to show that he was a purchaser for a valuable consideration without notice (Easter v. Allen, 8 Allen, 7). If a bill charges usury and fraud in the purchase of a legacy, and the defendant admits that he did not pay full value, the *onus* is thrown upon him to prove what he did advance (Deaderick v. Watkins, 8 Humph. 520); or where a note is shown to have been fraudulently in circulation, the burden is upon the holder to prove that he came by it fairly (Aldrich v. Warren, 16 Miss. 465); or where a sale is averred to be fraudulent, it is for the party claiming the property to make his title clear (Corcoran v. Sheriff, 19 La. Ann. 139). Where plaintiff and defendant both claim under purchases from the same person, the party alleging fraud in the purchase of the other is bound to prove it; but if one of them is impeached for fraud, the burden of proof is changed, and the evidence of fraud as to that purchase must be overcome by counter evidence of *bona fides*. Hair v. Little, 28 Ala. 236. Under the Iowa recording act, the burden is on the grantor of a fraudulent purchaser to show that he purchased in good faith. Falconburg v. McIlravy, 36 Iowa, 488. When a deed is alleged to have been given without valid consideration, the burden of proof is on the party so alleging. Jones v. Berkshire, 15 Iowa, 248.

Fraud is not to be presumed from the provisions of an instrument which admits of a contrary construction (Bank of Silver Creek v. Talcott, 22 Barb. 550); nor from the incorrectness of a debtor's expressed estimate of the value of his property (Artman v. Bell, 9 Phila. 237); nor from the want of possession after an absolute sale of personal property, if such possession is out of the power of the parties (Conard v. Atlantic Ins. Co., 1 Pet. 386; Hamilton v. Russell, 1 Cranch, 97); nor from the possession of real estate by a vendor after an absolute sale, though the circumstance may be properly submitted to the jury from which to infer fraud (Noble v. Coleman, 16 Ala. 77; s. p. Short v. Tinsley, 1 Met. (Ky.) 397; Steward v. Thomas, 35 Mo. 202; Allentown Bank v. Beck, 49 Pa. St. 394; Kid v. Mitchell, 1 Nott & M. 334; Hancock v. Horan, 15 Tex. 507); nor does the fact that a party to a contract of suretyship is unlettered raise a presumption against its validity (Ellis v. McCormick, 1 Hilt. 313). Effect of fraud on subscriptions. 14 South. L. Rev. n. s. 177.

(a) Mansfield, C. J., *Moses v. Macferlan*, 2 Burr. 1011.

(b) Load v. Green, 15 M. & W. 216.

(c) White v. Garden, 10 C. B. 919.

the price. Where a workman has agreed to do a certain job for a certain sum, upon the face of a false and fraudulent representation by the employer, the workman may treat the special agreement as a nullity, and sue for the recovery of a fair and reasonable remuneration. (*d*) But if the workman has exercised, or ought to have exercised, his own judgment and skill in the matter, and ought not to have depended upon the representation of the employer, he will not be permitted to avoid the contract on the ground of fraud. (*e*) If a man is drawn in to drink, in order that he may be thrown off his guard, and an unfair and hard bargain be imposed upon him, the contract cannot be enforced. (*f*) Where a fraudulent misrepresentation *dans locum contractui*, or giving occasion to the contract, has been made by one who is no party to the contract, there the contract cannot be avoided; but the person who made the representation will be compelled to make good his assertion as far as this may be possible. But where the false representation has been made by a person who is a party to the agreement, then the contract may be avoided by the party who has been deceived. (*g*) But a contract cannot be * avoided by reason of a representation con- [* 1174] cerning some matter altogether collateral to the contract. Where, therefore, an agreement was entered into for the letting and hiring of apartments on the strength of a representation by the hirer that he wanted them for a perfumer's business, and as soon as the agreement was executed, and he had obtained possession, he used the premises as a common bawdy-house, it was held that the landlord had no right to avoid the contract and treat the tenant as a trespasser. (*h*) Where, however, a tenant holding under a lease which was not assignable without the consent of the landlord, was desirous of selling his lease, and the plaintiff, in order to obtain an assignment of the lease to a friend, represented the latter to be a responsible and eligible person, and upon the faith of this representation obtained from the

(*d*) *Selway v. Fogg*, 5 M. & W. 86. 95; 22 L. J. Ch. 559; *Rawlins v. Wick-*

(*e*) *Baily v. Merrell*, 3 Bulst. 94. ham, 3 De G. & J. 304; 28 L. J. Ch.

(*f*) *Johnson v. Medlicott*, 3 P. Wms. 188; *Ld. Wensleydale, Smith v. Kay*, 130, in notis; *Pitt v. Smith*, 3 Campb. 80 *ib.* 61; 7 H. L. C. 775.

33. (*h*) *Ferret v. Hill*, 15 C. B. 225; 23

(*g*) *Pulsford v. Richards*, 17 Beav. L. J. C. P. 186.

defendant an agreement to assign the lease to such friend, and also the landlord's written consent to the assignment, and the representation was false to the knowledge of the plaintiff at the time he made it, and therefore fraudulent, it was held that the representation went to the very essence of the contract, and entitled the defendant to rescind the agreement. (i)

False Representations. — In order to entitle a party to rescind a contract, it is sufficient to show that there was a fraudulent representation as to any part of that which induced him to enter into the contract. But when there has only been an innocent misrepresentation, it is no ground for a rescission, unless it was such that there is a complete difference in substance between the thing bargained for and that obtained, so as to constitute a failure of consideration; (k) or perhaps where it is a material inducement for entering into the contract. (l) A representation is made fraudulently, when it is made with a knowledge of its untruth, or in ignorance whether it is true or untrue. (m) Where there has been a fraudulent misrepresentation, or a wilful concealment of fact, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it that he might have known the truth by proper inquiry. (n) If a person makes a representation calculated to induce another to assume a particular liability, and the circumstances [* 1175] are afterward, before liability * assumed, so altered to the knowledge of the person making the representation that the alteration might affect the course of conduct of the person to whom the representation was made, it is the imperative duty of the person who made the representation to communicate to the person to whom he made it the alteration of those circumstances; and the person to whom the representation

(i) *Canham v. Barry*, 24 L. J. C. P. 100; 15 C. B. 603.

(k) *Kennedy v. Panama, &c. Royal Mail Co.*, 36 L. J. Q. B. 260; L. R. 2 Q. B. 580; *Mackay v. Dick*, 6 Ap. Cas. 265, per Ld. Blackburn.

(l) *Rawlins v. Wickham*, 3 De G. & J. 304; *Fane v. Fane*, L. R. 20 Eq. 698; *Pollock on Contracts*, 3rd ed. 520, 540.

(m) *Behn v. Burness*, 3 B. & S. 751; 32 L. J. Q. B. 204; *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 64; 39 L. J. Ch. 849.

(n) *Venezuela Co. v. Kisch*, L. R. 2 H. L. 99; 36 L. J. Ch. 849; see also *Smith v. Chadwick*, 20 Ch. D. 27; *Redgrave v. Hurd*, 20 Ch. D. 1.

has been made will not be bound in equity by any contract entered into on the faith thereof, unless such a communication has been made. (o) But in the case of a sale, the maxim *caveat emptor* applies; and the vendor is not bound to inform the purchaser that he is laboring under a mistake in no way induced by the act of the vendor. (p)

Fraudulent Concealment. — Suppression of the truth, as much as misrepresentation of a material fact, will vitiate any contract the validity of which depends upon the truth and accuracy of the representation on which it was made. (q) Where the trustee of a deed of separation obtained a covenant from the husband to pay him an annuity for the wife's benefit, and the trustee concealed from the husband the fact that, at the time of the execution of the deed and covenant, he had committed adultery with the wife, it was held that the husband might avoid the deed. (r)

Fraud by Means of Agents. — If a principal desirous of selling or letting property, knows of a latent defect, and expressly authorizes his agent to state that it does not exist, or to make any statement of similar import, or if he purposely employs an agent ignorant of the truth, in order that such agent may innocently make a false statement, believing it to be true, and may so deceive the party with whom he was dealing, in either of these cases the representation of the agent will be the representation of the principal, and coupled with the principal's knowledge of its falsehood, will be a fraud. There is no implied warranty or undertaking on the part of the lessor of realty that it is fit for the purpose for which it is let, or that it is in any particular state or condition at the time of the demise; and it has accordingly been held that, although a principal who employs an agent to let a house knows that the house is encumbered with a nuisance of so serious a nature as to render it an unfit place of residence for any family of respectability, yet he is not guilty of any fraud in the eye of the law by neglecting to make known the existence of the nuisance to the agent, and

(o) *Traill v. Baring*, 33 L. J. Ch. 521. (q) *Prideaux v. Lonsdale*, 4 Giff. 159.

(p) *Smith v. Hughes*, L. R. 6 Q. B. 597; 40 L. J. Q. B. 221. But see *post*, p. * 1181. (r) *Evans v. Edwards*, 22 L. J. C. P. 214.

through him to the parties who contract for the hiring of the house. (s)

[* 1176] ***Fraudulent Misrepresentations by Directors of Companies.** — The same rules as to false or deceptive representations which are applicable to contracts between individuals are also applicable to contracts between an individual and a company. No misstatement or concealment of any material facts or circumstances can be permitted in a prospectus issued to invite persons to become shareholders in a projected company. The public are in such a case entitled to have the same opportunity of judging of everything material to a knowledge of the true character of the undertaking as the promoters themselves possess. (t) But there must be a misrepresentation of some matter of fact, and not merely an incorrect statement of matter of law. (u) Mere exaggerated views of the advantages of the company, not containing any material misstatement of fact, are not sufficient to avoid the contract. (x) Where an applicant for shares agrees to be bound by the articles and memorandum of association, he must be taken to have notice of their contents, but not of documents referred to in them and misrepresented by the prospectus. (y) Where a person believes that he has been misled by representations which are false or deceptive into taking shares in a proposed company, it is his duty to raise the objection at an early period, and to be guilty of no needless delay. (z) But the contract between a shareholder who has been deceived by a fraudulent prospectus, and the company, is voidable only, and not void, and can only be avoided subject to the rights of creditors where there is a winding-up order, (a) or a voluntary winding up. (b)

(s) *Cornfoot v. Fowke*, 6 M. & W. 358; see *ante*, p. * 228.

(t) *Venezuela Co. v. Kisch*, L. R. 2 H. L. 99; 36 L. J. Ch. 849.

(u) *Rashdall v. Ford*, L. R. 2 Eq. 750; 35 L. J. Ch. 769; *Beattie v. Lord Ebury*, L. R. 7 H. L. 102; see *Eaglesfield v. Londonderry*, 4 Ch. D. 693.

(x) *Denton v. Macneil*, L. R. 2 Eq. 352.

(y) *Kisch v. Venezuela Ry. Co.*, 34 L. J. Ch. 545.

(z) *Venezuela Co. v. Kisch*, *supra*; *Ashley's case*, L. R. 9 Eq. 263; 39 L. J. Ch. 354; *M'Niell's case*, L. R. 10 Eq. 503; 39 L. J. Ch. 822.

(a) *Oakes v. Turquand*, 36 L. J. Ch. 949; L. R. 2 H. L. 325; *Kent v. Freehold Land Co.*, L. R. 3 Ch. 493; 37 L. J. Ch. 653; *Holdsworth v. City of Glasgow Bank*, 5 Ap. Cas. 317.

(b) *Stone v. City Bank*, 3 C. P. D. 282, C. A.

But where persons have been induced by fraud to take shares in a company, and have, within a reasonable time after discovery of the fraud, repudiated the shares, and have taken proceedings to have their names removed from the list of shareholders, they are entitled to have their names removed, although a decree for that purpose may not have actually been obtained at the date of the winding-up order. (c)

The general rule of law, that a person purchasing goods in consequence of a fraudulent representation may retain the goods, and still have his action for damages, does not apply to shares in * a joint-stock company; for a shareholder, [* 1177] becoming a partner, can bring no action for damages while he remains in the company. His only remedy is *restitutio in integrum*, and rescission of the contract; and if that is impossible by the winding up of the company, or for any other reason, his action for damages cannot be maintained. (d) But it seems he is entitled to prove in the liquidation for damages for calls made or which might be made on his shares. (e)

Fraudulent Misreading of a Deed¹—If a man who cannot read executes a deed which is falsely read, or the sense declared different from the truth, the deed will not bind him. (f) “It is at the peril of the party to whom the deed is made that the true effect and purport of the writing be declared if it be required; but if the party who should deliver the deed doth not require it, he shall be bound by the deed, although it be penned against his meaning.” (g)

So where the defendant's signature upon the back of a bill of

¹ For recent cases, in which a party to a written contract has claimed that he was led to subscribe it without reading it, and was misled as to its purport, see *Cole v. Hay*, 12 Neb. 440; *Carey v. Miller*, 25 Hun, 28; *Le Saulnier v. Loew*, 53 Wis. 207. Deed sustained where grantee put grantor's name to it, but grantor afterward acknowledged and delivered it. *Clough v. Clough*, 73 Me. 487.

(c) *Pawle's case*, L. R. 4 Ch. 497; *parte Appleyard*, 18 Ch. D. 587, following *Mudford's claim*, 14 Ch. D. 634. 4 H. L. 64; and see *ante*, pp. *812, *814, *830.

(d) *Holdsworth v. City of Glasgow Bank*, 5 Ap. Cas. 317.

(e) *Great Australian Gold Co., ex*

(f) 2 Rolle's Abr. 28, *Faith* (S); *Simons v. Gt. West. Ry. Co.*, 2 C. B. x. s. 620; 26 L. J. C. P. 25; *Com. Dig. Faith* (B 2); *Hirschfield v. L. B. & S. C. Ry. Co.*, 2 Q. B. D. 1.

(g) *Thoroughgood's case*, 2 Co. 9 a, b.

exchange was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and was not guilty of any negligence in so signing the paper, it was held that he was not liable in an action against him as indorser by a *bona fide* holder for value. (*h*)

So where the plaintiff was induced to sign a receipt for compensation for injuries in a railway collision by false representations, it was held that the document did not operate as a valid release. (*i*)

The Effect of Fraud is not absolutely to avoid a contract induced by it, but to render it voidable at the option of the party defrauded; (*k*) and the contract continues valid until the party defrauded has determined his election by avoiding it. (*l*) In the case, therefore, of a sale or purchase obtained by fraud, the property in the thing sold passes by the contract until the contract is avoided, so that an innocent party buying from a fraudulent purchaser may acquire an indisputable title to the subject-matter of the contract, though the contract is voidable as between the * original parties. All mesne dispositions of the property to persons not cognizant of the fraud are valid. (*m*)

Determination of the Power of Avoidance.¹—A party who intends to repudiate a contract on the ground of fraud should do so as soon as he discovers the fraud; for if after the discovery of the fraud he treats the contract as a subsisting contract, or if

¹ *Cummins v. Lods*, 2 Fed. Reporter, 661; *Norrington v. Wright*, 5 Fed. Reporter, 768; *Dingley v. Oler*, 11 Fed. Reporter, 372; *American Wine Co. v. Brasher*, 13 Fed. Reporter, 595; *Smith v. Brittenham*, 98 Ill. 188; *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75; *Knight v. Houghtalling*, 85 N. C. 17; *Jones v. National Building Assoc.*, 94 Pa. St. 215. Compare *Crawford v. Scovell*, ib. 48; *Cates v. Bales*, 78 Ind. 285; *Norrington v. Wright*, 21 Am. L. Reg. n. s. 395 and note.

(*h*) *Foster v. Mackinnon*, L. R. 4 C. P. 704; 38 L. J. C. P. 310.

(*i*) *Hirschfield v. L. B. & S. C. Ry. Co.*, 2 Q. B. D. 1.

(*k*) *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 64; 39 L. J. Ch. 849.

(*l*) *Clough v. London & North-Western Ry. Co.*, L. R. 7 Ex. 26, 34; 41 L. J. Ex. 17.

(*m*) *White v. Garden*, 10 C. B. 927; *Stevenson v. Newnham*, 13 C. B. 302; 22 L. J. C. P. 110; *Ex parte Ward*, 20 Ch. D. 356.

in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, (*n*) he will be deemed to have waived his right of repudiation, and must then bring an action for damages for the deceit. (*o*) And whenever a party to a contract has a right to elect whether he will avoid it or treat it as a subsisting contract, his election may be manifested by acts as well as by words, and when once made is final, and cannot be retracted. (*p*) Moreover, lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined. But the mere fact that one who is a party to the fraud has issued a writ and commenced an action before the rescission, is not such a change of position as will preclude the defrauded party from exercising his election to rescind; nor is it necessary that there should be a declaration of his intention to rescind prior to the plea. (*q*) And the discovery of a new incident in the fraud, which only strengthens the evidence of the original fraud, cannot revive a right of repudiation which has once been waived. (*r*)

The right of repudiation of a contract on the ground of fraud does not prevail where a man has by his own act put it out of his power to place the parties in the same position as they were in at the time the contract was made. A purchaser who has obtained possession of property under a contract of sale cannot rescind the contract on the ground of fraud, and bring an action for the recovery of the purchase-money, unless he can restore the subject-matter of the sale to the vendor. (*s*) Thus if a butcher has bought live cattle upon the faith of a fraudulent representation, he cannot, after he has killed the cattle, rescind

(*n*) *Clough v. London & North-Western Ry. Co.*, L. R. 7 Ex. 26, 35; 41 L. J. Ex. 17; *Morrison v. The Universal Marine Ins. Co.*, L. R. 8 Ex. 196, 204.

(*o*) *Selway v. Fogg*, 5 M. & W. 86; *Read v. Hutchinson*, 3 Campb. 352.

(*p*) *Ward v. Day*, 33 L. J. Q. B. 13; Com. Dig. *Election* (C 2).

(*q*) *Clough v. London & North-Western Ry. Co.*, L. R. 7 Ex. 26, 35; 41 L. J. Ex. 17.

(*r*) *Campbell v. Fleming*, 1 Ad. & E. 40.

(*s*) *Udell v. Atherton*, 7 Jur. n. s. 777; see *ante*, *Contract of Sale*, p. *998.

[* 1179] the contract, and recover * back the price, but he must bring an action for damages for the deceit. (*t*) And if a voidable contract has been acted upon by a party who might have avoided it, and who has refrained from doing so in the hope that it may turn out to his advantage, such party cannot then, after abiding the event, or dealing with the subject-matter of the contract, elect to annul the transaction. (*u*)

Where a person who has applied for shares in a company which have been duly allotted to him, seeks to have his name removed from the register of shareholders, on the ground of a substantial variance between the prospectus upon the faith of which the shares were applied for and the memorandum of association, he must show that he used due diligence in ascertaining the contents of the memorandum, and that he repudiated the shares at the earliest practicable moment. If the memorandum and articles of association are in existence at the time when he applies for the shares, and if he agrees to take his shares on the footing of the memorandum and articles of association, he must be held bound to look at them before he applies for shares. If they are not in existence at the time, then at the very latest when he receives his allotment of shares he ought to satisfy himself that there is nothing in them to which he desires to make any objection. (*x*)

Constructive Fraud.¹—“Trustees, agents, commissioners, and assignees of bankrupts, solicitors to commissions of bankruptcy, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any persons who, by being employed or con-

¹ Bigelow, *Fraud*, 190, 191; Kerr, *Fraud, &c.* 150, 152; Tayl. Ev. 161; *Marye v. Strouse*, 5 Fed. Reporter, 483; *Duncomb v. New York, &c. R. R. Co.*, 84 N. Y. 190; note on Gifts between persons standing in confidential relations, by H. W. Rogers, 21 Am. L. Reg. n. s. 376.

Contracts by directors, &c. of corporations, for their own benefit, voidable. *Wardell v. R. R. Co.*, 103 U. S. 651; *Thomas v. Brownville, &c. R. R. Co.*, 2 Fed. Reporter, 877. Their personal liability. *Booth v. Robinson*, 55 Md. 419.

(*t*) *Clarke v. Dickson*, Ell. Bl. & Ell. 155; 27 L. J. Q. B. 223; *Mixer's case*, 4 De G. & J. 575; *Sheffield Nickell Co. v. Unwin*, 2 Q. B. D. 214; *Urquhart v. Macpherson*, 3 Ap. Ca. 831; *Tenant v. City of Glasgow Bank*, 4 Ap. Ca. 615.

(*u*) *Ormes v. Beadel*, 30 L. J. Ch. 4; *Campbell v. Fleming*, 1 Ad. & E. 40.
(*x*) *Peel's case*, L. R. 2 Ch. 674; 36 L. J. Ch. 757.

cerned in the affairs of another, have acquired a knowledge of the state of his property, are incapable of entering into any contract for the purchase of such property for themselves, except under certain restrictions and limitations;" (y) and a purchase made under such circumstances will be set aside, even after it has been completed, and a reconveyance will be directed. (z) A trustee or an agent for sale cannot, under ordinary circumstances, become himself the purchaser of the property confided to him to sell. (a) A solicitor cannot buy an estate of his client, unless he deals with him "at arm's length" through the intervention of another solicitor, from * whom no necessary [* 1180] information is withheld, and who properly discharges his duty; (b) or unless he shows to demonstration that no industry on his part could have got a better bargain; (c) nor can an arbitrator purchase from the parties to the reference, nor a guardian from his ward, nor a trustee from his *cestui que trust*, unless the surrounding circumstances prove beyond all doubt that the transaction was perfectly fair and advantageous for the client, *cestui que trust*, or other parties affected by it. (d) And although a solicitor or agent can show that he is entitled to purchase, yet if, instead of openly purchasing, he purchases in the name of a trustee or agent, without disclosing the fact, such purchase cannot stand. (e) An agent for sale who takes an interest in a purchase negotiated by himself, is bound to disclose to his principal the exact nature of his interest, and it is not enough merely to disclose that he has an interest, or to make

(y) *York Buildings Co. v. Mackenzie*, 8 Bro. P. C. 93; *Tate v. Williamson*, L. R. 1 Eq. 528; 2 Ch. 55; *Luff v. Lord*, 34 Beav. 220; *Summers v. Griffiths*, 35 Beav. 27; 2 Sugd. Vend. & Pur. 887, ed. 1846; Dig. lib. 18, tit. 1, lex 34, sect. 7.

(z) *Clark v. Malpas*, 31 Bea. 80; 4 De G. F. & J. 401; 31 L. J. Ch. 696; *Gresley v. Monsley*, 31 L. J. Ch. 537; *Douglass v. Culverwell*, 31 L. J. Ch. 543; *Clanricarde v. Henning*, 30 L. J. Ch. 865; 30 Beav. 175; *Hannah v. Hodgson*, 30 Beav. 19; 30 L. J. Ch. 738.

(a) *Crowe v. Ballard*, 3 Bro. Ch. C.

119; *Ex parte Lacey*, 6 Ves. 626; see *Hickley v. Hickley*, 2 Ch. D. 190.

(b) *Gibbes v. Daniel*, 4 Giff. 1.

(c) *Cutts v. Salmon*, 21 L. J. Ch. 750; *Champion v. Rigby*, 1 Russ. & Myl. 539; *Casborne v. Barsham*, 2 Beav. 76; *Hatch v. Hatch*, 9 Ves. 296; *Wright v. Proud*, 13 Ves. 138; *Gibson v. Jeyes*, 6 Ves. 266; 3 Cujacius, 388; *Gibbes v. Daniel*, 4 Giff. 1.

(d) *Cane v. Lord Allen*, 2 Dow. 289; *Dawson v. Massey*, 1 Ball & Beat. 219; *Lord Hardwicke v. Vernon*, 4 Ves. 411; 14 Ves. 504; 2 Sugd. Vend. 200.

(e) *Lewis v. Hillman*, 3 H. L. C. 630.

statements such as would put the principal on inquiring. (*f*) If the agent does purchase, the agency is dissolved, he comes forth as a principal, and can claim no commission or remuneration as agent. (*g*)

Any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal; and if it renders it impossible for him to have the full benefit of the contract, entitles him, if he applies in time, to have it set aside. (*h*) So also trustees lending themselves to a fraud by their *cestui que trust*, and receiving money from the defrauded party, cannot escape the liability which attaches alike to them and to their *cestui que trust*, and must refund money paid to them in consideration of their fraud. (*i*)

Whenever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed, to exert influence over the person trusting him, the court will not allow any transactions between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him. (*k*)

- [* 1181] * *Duress*.¹—Any agreement made under improper pressure is voidable. Thus where B discounted bills

¹ For the American doctrine as to duress, see 1 Whart. Contr. c. 8; 1 Story, Contr. sect. 510; 1 Pars. Contr. 392; 2 Pars. Contr. 554; 6 Wait, Act. & D. c. 19; U. S. Dig. tit. *Contracts*, sect. 1300; ib. tit. *Duress*; Ann. Dig. 1870–1878, tit. *Contracts*, III.; Ann. Dig. 1879, &c., tit. *Duress*; *Hatter v. Greenlee*, 1 Port. 222, 26 Am. Dec. 370; *Wright v. Remington*, 41 N. J. L. 48; 18 Am. L. Reg. n. s. 743, and note by M. D. Ewell, ib. 748; also *Remington v. Wright*, 43 N. J. L. 451; *McPherson v. Cox*, 86 N. Y. 472; *Hackley v. Headley*, 45 Mich. 569; 21 Am. L. Reg. n. s. 109, ib. 115 note; 15 Cent. L. J. 262.

Duress of maker of note no defence to indorser. *Bowman v. Hiller*, 130 Mass. 153. Father may avoid mortgage which he was induced to give by duress of his son. *Harris v. Carmody*, 131 Mass. 51; *Parcher v. Marathon County*, 52 Wis. 388. Proof necessary to sustain wife's charge that her execution of mortgage was obtained by coercion or undue influence of husband. *Smith v. Allis*, 52 Wis. 337.

(*f*) *Dunne v. English*, L. R. 18 Eq. 524. graph Co. v. India Rubber Co., L. R. 10 Ch. 515.

(*g*) *Salomons v. Pender*, 34 L. J. Ex. 95; 3 H. & C. 639. (*i*) *Phosphate Sewage Co. v. Hartmount*, 5 Ch. D. 394.

(*h*) *Panama & South Pacific Tele-* (*k*) *Tate v. Williamson*, L. R. 1 Eq. 528; 2 Ch. 55.

to which he had forged his father's signature, and the holders of the forgeries, working on the fears of the father for his son's safety, but without holding out any direct threat, or making any distinct promise not to prosecute, obtained from the father equitable security for the amount of the bills, it was held that the security was void. (*l*) If a man pays money or gives securities to redeem his goods from the custody of the law, that is not a case of duress; nor can he recover back his money or defend himself from proceedings taken to enforce the securities which he has paid or given under legal compulsion. (*m*) If a person, having been constrained by duress to make a contract, afterward voluntarily acts upon it, he thereby affirms its validity, and loses the right of avoiding it. (*n*)

Mistake.²—Where one of the parties intends to make a contract on one set of terms, and the other intends to make a

² An inconsistency or defect in a contract arising from a scrivener's error, or a clerical mistake in drafting, may be disregarded, or corrected by construction, when the existence of the error and the manner in which it should be corrected to carry out the intention of the parties, are apparent on the face of the instrument (*Richmond v. Woodard*, 32 Vt. 833; *Fowler v. Woodward*, 26 Minn. 347; *Willis v. Jelineck*, 27 Minn. 18; and see *Marion v. Faxon*, 20 Conn. 486; *Staples v. Wheeler*, 38 Me. 372; *Medway Cotton Manufactory v. Adams*, 10 Mass. 360); yet because one clause of a contract is to be disregarded as having been made under mistake, it does not follow that other and independent provisions must be omitted (*Verzan v. McGregor*, 23 Cal. 339). But in the absence of fraud, an instrument in writing, deliberately adopted by the parties, must stand as written, although they may have mistaken its legal intent (*Holmes v. Hall*, 8 Mich. 66); an interpretation based on their presumed ignorance of the law is inadmissible (*Boner v. Mahle*, 3 La. Ann. 600); neither can consideration of the folly or wisdom of a contract according as one or another construction is put upon it, be considered (*Lowber v. Le Roy*, 2 Sandf. 202). Where the strict construction of a contract would work great injustice and produce results that could not reasonably have been intended by the parties, it will be construed not by its literal terms, but according to its spirit and meaning. *Bickford v. Cooper*, 41 Pa. St. 142.

When through fraud, accident, or mistake, something has been inserted or omitted, so that the instrument as produced does not express the actual intent of the parties, the one prejudiced may, in general, have relief, though the error is not palpable, and cannot be corrected by mere examination of the document; but whether this relief may be granted by receiving parol evidence in a proceeding instituted to enforce a contract, or must be sought in a separate suit brought to reform it, is a point on which the laws of the various States differ. Under the

(*l*) *Williams v. Bayley*, L. R. 1 H. L. Hunter, L. R. 3 Ch. 487; 37 L. J. Ch. 200; 35 L. J. Ch. 717.

(*m*) *Liverpool Marine Credit Co. v.* (*n*) *Ormes v. Beadel*, 2 De G. F. & J. 333; 30 L. J. Ch. 1.

contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, and the terms have not been reduced into writing, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. (o) And even if the terms of the contract have been reduced into writing, and there is a latent ambiguity, and the parol evidence adduced to explain it shows that the parties were not of one mind, there is no contract. Thus if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that there are two persons or ships to which the description in the contract equally applies, and that each of the parties, misled by the similarity, had a different person or ship in his mind, no contract exists between them. (p) Where personal considerations enter into a contract, error as to the person with whom the contract is made, annuls the contract; but where the person sought to be bound would have been equally willing to make

reformed procedure as adopted and developed in several of the States, it is not necessary that error in a contract should be corrected in an independent suit for the purpose, but whatever would sustain such a suit may be shown against the contract in an action in which it is sought to be enforced as it reads. States adhering to the distinction between legal and equitable remedies more generally require resort to a suit to reform the instrument. See 2 Pom. Eq. Jur. sects. 838-871; Report N. Y. Civ. Code, sect. 805; also 18 Am. L. Reg. n. s. 89, note; 13 Fed. Reporter, 256, note.

The courts will supply by implication, omitted stipulations which are necessary to make the obligations of the parties intelligible and complete, and which are supported by law or usage, provided the contract as written does not manifest an intention to exclude them; thus if the sum to be paid or the time for performance is not specified, the promisor may be held to payment of the market value of the subject-matter, or to performance within a reasonable time, considering the nature of the act to be done. Report N. Y. Civ. Code, sect. 820-822; *Shepler v. Scott*, 85 Pa. St. 329; and see *Lawrence v. Gallagher*, 42 N. Y. Superior Ct. 309, 322.

But although that which is necessarily implied is as much part of an instrument as that which is expressed, yet omissions cannot be thus supplied unless the implication results from the language, and is necessary in order to give effect to the intent. *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276.

See, further, 1 Story, Contr. sect. 528; 3 Pars. Contr. 397; 7 Wait, Act. & D. c. 44; also, as to reformation for mistake, *Robbins v. Magee*, 76 Ind. 381; *Styers v. Robbins*, ib. 547; *Ben. Franklin Ins. Co. v. Gillett*, 54 Md. 212; *German Am. Ins. Co. v. Davis*, 131 Mass. 316; *Paine v. Upton*, 87 N. Y. 327; *Tabor v. Cilley*, 53 Vt. 487; *Allen v. Yeater*, 17 W. Va. 128.

(o) *Scott v. Littledale*, 8 E. & B. 815; (p) *Raffles v. Wichelhaus*, 2 H. & C. 27 L. J. Q. B. 201. 906; 33 L. J. Ex. 160.

the same contract with any other person, the contract is good. (*q*) Where the terms of the written instrument do not correctly represent the mind of the parties, the court will rectify it, provided the mistake is one of fact, (*r*) and common to both parties. (*s*) And where a contract has been entered into upon the faith of a state of things which does not exist, (*t*) or where one of the parties has *made a mistake to [*1182] which the other has by his acts contributed, even unintentionally, the contract will be rescinded, (*u*) provided the court can replace the parties in their original condition, (*x*) or specific performance will not be enforced. (*y*)

Where in the making of an agreement between two parties there has been a mutual mistake as to their rights, occasioning an injury to one of them, the rule of equity is in favor of interfering to grant relief; and the court will not decline to do so merely because circumstances may have rendered it difficult to restore the parties exactly to their original condition; and although where the mistake arises from ignorance of a well-known rule of law, the court will not interfere, yet where it arises upon a construction of a document of doubtful meaning, the doctrine of *ignorantia juris neminem excusat* will not apply, and the court will give relief. (*z*)

So also the court will, it seems, give relief where there has been a mutual mistake without fraud, even where the contract has been completed. (*a*) Where there has been no misrepresentation of fact, but a mutual mistake in law, the court will not make one party responsible. (*b*) Where there is a mistake upon a sale of land in the acreage, and not in the essence or corpus with which the contract deals, the court will decree performance. (*c*) But the court will not decree specific performance of

(*q*) *Smith v. Weathercroft*, 9 Ch. D. 223.

(*r*) *Powell v. Smith*, L. R. 14 Eq. 85; 41 L. J. Ch. 734.

(*s*) *Harris v. Pepperell*, L. R. 5 Eq. 1. 433; 36 L. J. Ch. 177.

(*t*) *Emmerson's case*, L. R. 1 Ch. 124; 8 Ch. 118; 41 L. J. Ch. 643; 42 L. J. Ch. 177.

(*u*) *Torrance v. Bolton*, L. R. 14 Eq. 124; 8 Ch. 118; 41 L. J. Ch. 643; 42 L. J. Ch. 177.

(*x*) *Emmerson's case*, *supra*.

(*y*) *Baskcomb v. Beckwith*, L. R. 8 Eq. 100; 38 L. J. Ch. 536.

(*z*) *Earl Beauchamp v. Winn*, L. R. 6 H. L. 223, 224.

(*a*) *Jones v. Clifford*, 3 Ch. D. 779.

(*b*) *Eaglesfield v. Marquis of Londonderry*, 4 Ch. D. 693.

(*c*) *Mackenzie v. Hesketh*, 7 Ch. D. 675.

a contract where the contract was made by the defendant under a *bona fide* mistake, and there would be a manifest injustice in holding him to his bargain. (*d*) But in all cases the special circumstances are to be considered. (*e*)

Where the mistake is unilateral, and the party by whom it was made is the sufferer, relief will not be granted unless there has been some undue influence, misrepresentation, surprise, or abuse of confidence. (*f*)

Failure of Consideration. — When a contract is simply null and void, and not tainted with illegality, money paid by one of the contracting parties to the other may, in general, be recovered back on the ground of a failure of consideration. If a contract is made for the sale and purchase of railway scrip or shares, foreign state bonds, railway debentures, or other securities, and

the scrip, shares, or bonds turn out to be forgeries, so [* 1183] that the purchaser * has never obtained that which he agreed to buy and the vendor to sell, he is entitled to

maintain an action for the recovery of his purchase-money, on the ground that there has been a total failure of consideration. (*g*)

Where the defendant sold a bill to the plaintiff, which purported on the face of it to be drawn at Sierra Leone, where no stamp would be required, but the bill turned out to have been drawn in London, and to be of no value for want of a stamp, it was held that the plaintiff was entitled to recover back the money he had paid for the bill, as the bill was not what, upon the face of it, it purported to be, and was not such a bill as the defendant had agreed to sell and the plaintiff to buy. (*h*)

If a thing does not answer the description of that for which it is sold, the buyer is not bound to take it; and if he has paid for it, he may recover back the money as upon a failure of consideration. (*i*)

But the purchaser cannot recover back the price where he has

(*d*) *Swaisland v. Dearsley*, 29 Bea. 430.

(*e*) *Tamplin v. James*, 15 Ch. D. 215.

(*f*) *Broughton v. Hutt*, 3 De G. & J. 501; *Bentley v. Mackay*, 31 Beav. 143.

(*g*) *Young v. Cole*, 4 Sc. 495; 3 Bing. N. C. 730.

(*h*) *Gompertz v. Bartlett*, 23 L. J. Q. B. 65; 2 El. & Bl. 849; *Kempson v.*

Saunders, 12 Moore, 49; 4 Bing. 17;

Westropp v. Solomon, 8 C. B. 373; 19 L. J. C. P. 1.

(*i*) *Blackburn, J., Azemar v. Casella*, L. R. 2 C. P. 678; 36 L. J. C. P. 263.

got what he bargained for, although the subject-matter of the sale may subsequently turn out to be a thing of no value. (*k*) Thus where the vendor agreed to sell, and the purchaser to buy, scrip certificates of shares in the Kentish Coast Railway, and the certificates were delivered by the vendor, and the purchase-money paid, but the Kentish Coast Railway scheme was subsequently abandoned, and the company dissolved, and the scrip repudiated on the ground that the secretary had issued it without authority, it was held that the purchaser could not recover from the vendor the money he had paid for it, as he had got what was intended to be bought and sold. (*l*)

If a man goes into the money market with a bill or note, and gets it discounted without putting his own name on the back of it, he is not bound to refund the money he receives if the bill is dishonored; but if it is not the bill or note of the parties whose names appear upon it, the money received in exchange for it cannot lawfully be retained. Where one man discounted a forged victualling bill, and another a forged navy bill, and another a forged private bill of exchange, it was held that each of the parties was entitled to recover back the money he had paid. (*m*) But the *holder of a bill is entitled to [*1184] know, on the day it becomes due, whether it is an honored or dishonored bill; and, therefore, notice of the forgery must be given to him on the very day that the payment is made to him, so as to enable him to send notice of the dishonor of the bill to the prior parties on that day. If, therefore, he receives the money, and if permitted to retain it during the whole of that day without any such notice having been given him, the parties who paid him the money cannot recover it back; for, otherwise, they would deprive the holder of his right to proceed against the other parties to the bill. (*n*)

The acceptor of a bill of exchange is bound to know the handwriting of the drawer, and cannot recover money which he has

(*k*) *Hall v. Conder*, 26 L. J. C. P. *Rogers v. Langford*, 1 Cr. & M. 637; 138. *Gurney v. Womersley*, 4 Ell. & Bl. 133;

(*l*) *Lamert v. Heath*, 15 M. & W. 24 L. J. Q. B. 46. 488; 15 L. J. Ex. 297.

(*n*) *Cocks v. Masterman*, 9 B. & C.

(*m*) *Jones v. Ryde*, 5 Taunt. 494; 908.

Wilkinson v. Johnston, 3 B. & C. 428;

paid upon a forged bill accepted by him, and which has gone into the market accredited with his genuine signature. (o) It is as much the duty, also, of bankers to know the handwriting of their customers who draw on them, as it is of an acceptor of a bill to know the drawer's handwriting; and, therefore, if a bill purporting to be drawn by a customer of the banker's is made payable at the bank, and the bankers take up and pay the bill to a *bona fide* indorsee for value, who presents it to them for payment, they cannot recover the amount from such indorsee. (p) But when a banker merely discounts a bill, it is otherwise. (q) If a party whose signature to a bill of exchange has been forged pays the bill, supposing the signature to be genuine, and so delays the defendant of his remedy against the other parties to the bill, he cannot recover back the money he has paid. (r)

Partial Failure of Consideration. — The general rule of law is that, when a contract has been in part performed, no part of the money paid under such contract can be recovered back, (s) unless the consideration is clearly severable. (t) Where money has been paid as a premium with an apprentice, it is not apportionable, and no part can be recovered back on the ground of failure of consideration by the death of the master. (u) So where the plaintiff had deposited with the defendant the half of a £50 bank note by way of pledge to secure the payment of a debt due from the plaintiff to the defendant for wines and suppers supplied to the plaintiff by the defendant in a brothel kept by her, to be there consumed in a debauch, and the plaintiff brought an action to * recover the half-note, it was held that as the plaintiff could not recover without showing the true character of the deposit, and that it was on an illegal consideration to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back. (x)

(o) Price v. Neal, 3 Burr. 1357.

(p) Smith v. Mercer, 6 Taunt. 81.

(q) Fuller v. Smith, 1 C. & P. 198.

(r) Mather v. Ld. Maidstone, 18 C. B. 295; 25 L. J. C. P. 311.

(s) Hunt v. Silk, 5 East, 449; Black-

burn v. Smith, 2 Exch. 783; Nicholson v. Ricketts, 29 L. J. Q. B. 55.

(t) Astle v. Wright, 25 L. J. Ch. 864.

(u) Whincup v. Hughes, L. R. 6 C. P. 78; 40 L. J. C. P. 104.

(x) Taylor v. Chester, L. R. 4 Q. B. 309.





